United States Court of Appeals for the Second Circuit



APPELLANT'S APPENDIX

74.1807

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

INSURANCE COMPANY OF NORTH AMERICA, Plaintiff-Appellee

v.

GELB BROS. & ZUCKERMAN, INC.,
JAMES J. JOWDY, JACQUELINE JOWDY,
EDWARD J. JOWDY, and JOAN JOWDY,
Defendants-Appellants

On Appeal from a Decision of the United States District Court, District of Connecticut

APPELLANT'S APPENDIX



Norris L. O'Neill 99 Pratt Street Hartford, Connecticut

Mark Asmar One Constitution Plaza Hartford, Connecticut

PAGINATION AS IN ORIGINAL COPY

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CIVIL DOCKET NITED STATES DISTRICT COURT

Jury demand date:

... TEC Form No. 106 Rev. ATTORNEYS TITLE OF CASE For plaintiff: Elmer W. Beasley INSURANCE COMPANY OF NORTH AMERICA 800 Asylum Avenue Hartford, Conn. 06105 GELB EROS. & ZUCKERMAN, INC. JAMES J. JOWDY, JACQUELINE JOWDY, EDWARD J. JOWDY, AND JOAN JOWDY For defendant: Mark A. Asmar Louis F. Green Arthur N. Greenblatt One Constitution Plaza Hartford, Conn. 06103 NAME OR RECEIPT NO. DISB. P1573 REC. COSTS STATISTICAL RECORD Clerk 5 mailed 15/00 E. Beasley Deposit GF 100869) 15 00 Marshal . 6 mailed Hyman, Keith Harding 4-3-74 Hutensky & Birnbaum sis of Action: Seeks damages; Docket fee (appeal) 5. 00 reach of contracr. Witness fees ion arose at: Depositions

DATE PROCEEDINGS 1973 1. COMPLATIT, filed with Exhibits A, B, C, &D. Summons issued and together 7/27 with same and copies of complaint & exhibits handed to Marshal for service. 9/24 10-15 2. Marshal's return showing service filed.
3. Appearances of Asmar, Green & Greenblatt entered for ALL defendants. 11-13 4. Notice of Motion filed. 5. PLAINTIFF'S SUPPORTING BRIEF ON MOTION FOR SUMMARY JUDGMENT. 6. STATEMENT OF MATERIAL FACTS PURSUANT OF RUEL 10 (a)3, Local Rules, filed 7. AFFIDAVIT SUPPORTING MOTION FOR SURMARY JUDGMENT filed. 11-29 8. Rrief in Opposition to Plaintiff's Notion for Susmary Judgment filed, 12-3 12-4 HEARING on Pitf. Motion for Survey Judgment, Decision reserved.
"Plaintiff rotion for surmary judgment is granted in accordance with the Pl aintiff's affidavits of debt, costs & attorneys fees. Within ten (10) days, the plaintiff shall file proposed findings of fact and conclusions of law, together with a proposed judgment form, So Ordered, Claire J.m 12-6-73 Copies mailed to counsel of record. 12-10 "Due to illness of plaintiff's counsel, the time for filing proposed finding of fact and conclusions of law, together with a proposed judgment, is extended to Jewary 14, 1974. So ordered, Clarie, J.m 12-13-73 Copies mailed to counsel. 1-21 Motion over to 2-4-74 by agreement of both counsel. 1-30 9. Finding of Fact and Conclusion of Law filed by defendant. HEARING on proposed finding of fact & conclusions of law. DEC. RESERVED.
Supplemental affidavit supporting Motion for Summary Judgment findings of
Fact & Conclusions of Law filed by Pltf. 2-4 10. Finding of Fact and Conclusions of Law, Clarie, J.m 2-22-74 Copies 2-19 mailed to counsel of record.

11. JULGMENT entered. Ordered Accordingly, Markowski, C.m 3/5/74...... 3-4-74 Copies mailed to counsel of record. 12, BILL OF COSTS filed, Ordered Accordingly, Markowski, C m 3-15 Copies mailed to counsel of record. 1-28-74 Court reporters notes of proceedings held on 12-3-74 filed. Sperber, R. 4-3-74 13. Notice of Appeal filed. Copies mailed to counsel of record. Copy of Notice, and docket sheet mailed to New Haven, \$25.00 check mailed to New Haven for deposit in the registry., also \$250.00 check, for Bond, A True Copy LAILLES! CYNYCOLER A. PARKOWSKI Class, U. S. District Court Ex. amm triuty Clork

United States District Court

FOR THE

DISTRICT OF CONNECTICUT

INSURANCE COMPANY OF NORTH AMERICA

CIVIL ACTION FILE NO......

Plaintiff

GELB EROS. & ZUCKERMAN, INC. JAMES J. JOWDY, JACQUELINE JOWDY, EDWARD J. JOWSY, AND JOAN JOWBY

SUMMONS

Defendant

To the above named Defendant &

You are hereby summoned and required to serve upon

ELMER W. BEASLEY, ESQ.

plaintiff's attorney , whose address IS: 880 ASYLUM AVENUE, HARTFORD, CONN. 06105

days after service an answer to the complaint which is herewith served upon you, within of this summons upon you, exclusive of the day of service. If you fail to do so, judgement by default will be taken against you for the relief demanded in the complaint.

Ey:--- (L. ...)

[Scal of Court]

FILED

FOR THE DISTRICT COURT PH 73 FOR THE DISTRICT OF CONNECTIGUERK U.S. DISTRICT COURT HARTFORD, CONN.

INSURANCE COMPANY OF NORTH AMERICA,)
Plaintiff,)

vs.

CIVIL ACTION
FILE NO.

GELB BROS. & ZUCKERMAN, INC.,

JAMES J. JOWDY, JACQUELINE JOWDY,

EDWARD J. JOWDY, and JOAN JOWDY,

Defendants.)

COMPLAINT.

Jurisdistion.

- 1. Plaintiff is an insurance company, organized and existing under the laws of the Commonwealth of Pennsylvania, having its principal place of business in Philadelphia, Commonwealth of Pennsylvania, and it is duly authorized to transact business in the State of Connecticut.
- 2. Defendant Gelb Bros. & Zuckerman, Inc. is a corporation, organized and existing under the laws of the State of Connecticut, having its last known principal place of business at 14 Beckley Avenue,

 Stamford, Fairfield County, Connecticut, a state other than the Commonwealth of Pennsylvania.
- 3. Defendants James J. Jowdy, Jacqueline Jowdy, Edward J.

 Jowdy, and Joan Jowdy are citizens of the State of Connecticut, and they
 all reside in Danbury, Fairfield County, and State of Connecticut.

 Defendants James J. Jowdy and Jacqueline Jowdy reside at 4 Overlook
 Terrace, Danbury, Connecticut, and defendants Edward J. Jowdy and
 Joan Jowdy reside at 9 Cedarcrest Drive, Danbury, Connecticut.
- 4. The matter involved herein, exclusive of interest and costs, exceeds the sum of Ten Thousand Dollars.

- 2 -

Claims For Relief.

Count I - Defendant Gelb Bros. & Zuckerman, Inc. - Connecticut.

- 1. At all times relevant to the subject matter of this action, defendant Gelb Bros. & Zuckerman, Inc. (Gelb) was engaged in the business of a wholesale cigarette distributor, and it conducted such business at 14 Beckley Avenue, in Stamford, Connecticut.
- 2. Gelb made application to the tax commissioner of the State of Connecticut for a license, permit or permission to engage in the business of a cigarette distributor under the provisions of Chapter 214 of Connecticut General Statutes, §§ 12-285 12-330, for the period commencing July 1, 1970, and ending June 30, 1971.
- 3. At Gelb's special instance and request, plaintiff became surety on the tax payment bond which Gelb was required to give to the tax commissioner of the State of Connecticut; which said bond was dated June 26, 1970, it was in the penal sum of \$100,000; and it was conditioned that Gelb should pay all taxes, interest, and penalties in accordance with the provisions of the statute pertaining to such business.
- 4. In consideration of plaintiff agreeing to become surety on Gelb's tax payment bond, as aforesaid, and as a condition precedent to plaintiff agreeing to become surety on said bond, Gelb executed and delivered to plaintiff a written application and agreement of indemnity, dated July 1, 1970, wherein and whereby Gelb agreed to indemnify plaintiff from and against any and all loss, cost, charges, suits, damages, counsel fees and expenses of whatever kind or nature which plaintiff should sustain or incur by reason of plaintiff becoming surety on said tax payment bond, and Gelb further agreed that any voucher or other evidence of any loss, costs, and expenses paid by plaintiff

on account of said bond should be prima facia evidence of the fact and extent of Gelb's liability to plaintiff. A duplicated copy of said application and agreement of indemnity is attached hereto, and made a part hereof, as Exhibit A.

- 5. Between July 1, 1970, and June 30, 1971, Gelb purchased cigarette tax stamps from the tax commissioner of the State of Connecticut to be attached to the cigarettes which it distributed or sold under the provisions of its permit, and it breached the terms of its permit and the conditions of its tax payment bond by its failure to pay the value of the stamps so purchased; in consequence of which the tax commissioner of the State of Connecticut made claim against plaintiff for the balance due and owing by Gelb for said tax stamps.
- 6. By reason of Gelb's defaults in failing to pay all taxes, interest, and penalties due and owing to the State of Connecticut under the terms of its permit, plaintiff was required to, and did on January 31, 1972, pay the tax commissioner of the State of Connecticut the sum of \$82,803.22 in discharge of its liability under said bond.
- 7. Upon plaintiff's payment to the state tax commissioner of the sum of \$82,803.22, as aforesaid, plaintiff became subrogated to all of the rights and remedies of the State of Connecticut against Gelb to recover said sum of \$82,803.22, with interest.
- 8. Plaintiff has been compelled to employ an attorney to represent it in the settlement of the claim of the tax commissioner of the State of Connecticut, and to bring this action to enforce the terms of Gelb's agreement of indemnity, and it is incurring counsel fees in the prosecution of this action, although the amount thereof cannot be determined at this time.

9. Gelb owes plaintiff the sum of \$82,203.22, plus interest at the statutory rate from January 31, 1972, plus the amount incurred for counsel fees.

Count II - Defendant Gelb Bros. & Zuckerman, Inc. - New York.

- 1. Plaintiff refers to paragraph 1 of Count I, and realleges it here to the same extent as if it were fully set forth herein.
- 2. On or about September 24, 1970, Gelb applied to the New York

 State Tax Commission for a permit to purchase cigarette stamps on

 credit, and pay for said stamps within thirty days after the date of purchase, pursuant to Article 20 of the Tax Law.
- 3. At Gelb's special instance and request, plaintiff became surety on its New York State Cigarette Credit Bond in the penal sum of \$15,000; which said bond was dated September 24, 1970; and was conditioned that Gelb should pay to the New York State Tax Commission all sums due for cigarette stamps purchased by it, including penalties and interest, within thirty days after purchase thereof.
- 4. In consideration of plaintiff agreeing to become surety on Gelb's New York State Cigarette Credit Bond, as aforesaid, and as a condition precedent to plaintiff agreeing to become surety on said bond, Gelb executed and delivered to plaintiff an application, containing an agreement of indemnity, dated September 24, 1970, wherein and whereby Gelb agrees to indemnify plaintiff from and against any and all loss, costs, charges, suits, damages, counsel fees, and expenses of whatsoever kind or nature plaintiff should sustain or incur by reason of becoming surety on said bond, and Gelb further agreed that any voucher or other evidence of any loss or expenses paid by it should be prima facia evidence of the fact and extent of its liability to plain-

tiff for such loss and expense. A duplicated copy of said agreement of indemnity is attached hereto, and made a part hereof, as Exhibit B.

- 5. Galb breached the conditions of its New York State Cigarette Credit Bond, in that it purchased cigarette stamps on credit, and failed to pay for such stamps within thirty days after the purchase thereof; in consequence of which the New York State Tax Commission made claim against plaintiff for the amount due and owing for such stamps in accordance with the provisions of said bond.
- 6. By reason of Gelb's default in payment of the cigarette stamps purchased by it, plaintiff was required to, and did on December 27, 1971, pay the New York State Tax Commission the sum of \$8,987.60 in discharge of liability under its bond.
- 7. Plaintiff is subrogated to the rights and remedies of New York State Tax Commission against Gelb for the recovery of said sum of \$8,987.60.
- 8. Gelb has breached the terms of its indemnity agreement with plaintiff, and it owes plaintiff the sum of \$8,987.60, plus interest thereon from December 27, 1971 at the rate permitted by law.
- 9. Plaintiff has been compelled to employ an attorney to represent it in the settlement of its liability to the New York State Tax Commission, and to bring this action against Gelb to enforce the terms of said agreement of indemnity, and it is incurring counsel fees in the prosecution of this action, although the amount thereof cannot be determined at this time.
- 10. Gelb owes plaintiff the amount of such counsel fees to be determined at the trial of this case.

Count III - James J. Jowdy and Jacqueline Jowdy.

- 1. Plaintiff refers to the matters stated in paragraphs 1 to 3, and 5 to 10, of Counts I and II, and incorporates them herein by this reference to the same extent as if they were fully set forth here.
- 2. In consideration of plaintiff agreeing to become surety on Gelb's bonds, as aforesaid, and as a condition precedent to plaintiff agreeing to become surety on said bonds, defendants James J. Jowdy and Jacqueline Jowdy executed and delivered to plaintiff their indemnity agreement, dated July 1, 1970, wherein and whereby they jointly and severally agreed to perform the obligations of said bonds, and to indemnify plaintiff from and against every claim, demand, loss, liability, cost, attorney's fees, and expense which plaintiff shall sustain or incur by reason of the execution of said bonds, including attorney's fees incurred by plaintiff in enforcing said indemnity agreement. A duplicated copy of said indemnity agreement is attached hereto, and made a part hereof, as Exhibit C.
- 3. By paragraph 8 of said indemnity agreement, Exhibit C, defendants James J. Jowdy and Jacqueline Jowdy agreed that any vouchers or other evidence of payment of loss and expenses incurred by plaintiff in connection with said bonds shall be prima facia evidence of the fact and extent of the liability of Gelb and of their liability to plaintiff for such loss and expense.
- 4. By reason of Gelb's failure to pay for the cigarette tax stamps purchased by it from the State of Connecticut and the State of New York, as aforesaid, it breached the terms and conditions of its bonds, and plaintiff was required to, and did, make the following payments in settlement of its liability under said bonds:

December 27, 1971 to New York State Tax Commission \$8,987.60

January 31, 1972 to tax commissioner of State of

Connecticut

82,803.22

\$91,790.82

- 5. Plaintiff has been compelled to employ an attorney to represent it in the determination and settlement of the claims made on the Gelb's cigarette tax payment bonds, on which plaintiff is surety, as aforesaid, and to bring this action to enforce the terms of the indemnity agreement executed by defendants James J. Jowdy and Jacqueline Jowdy (Exhibit C), and the plaintiff is incurring counsel fees, the amount of which cannot be determined at this time.
- 6. Defendants James J. Jowdy and Jacqueline Jowdy owe plaintiff \$91,790.82, plus interest thereon at the rate provided by law, and costs and attorney's fees to be determined at the trial of this case, and said defendants have failed and refused to pay any part thereof, although payment has been duly demanded.

Count IV - Edward J. Jowdy and Joan Jowdy.

- 1. Plaintiff refers to the matters stated in paragraphs 1 to 3, and 5 to 10, of Counts I and II, and incorporates them here by this reference to the same extent as if they were fully set forth here.'
- 2. In consideration of plaintiff agreeing to become surety on Gelb's bonds, as aforesaid, and as a condition precedent to plaintiff agreeing to become surety on said bonds, defendants Edward J. Jowdy and Joan Jowdy executed and delivered to plaintiff their indemnity agreement, dated July 1, 1970, wherein and whereby they jointly and severally agreed to perform all of the obligations of said bonds, and to indemnify plaintiff against all claims, demands, loss, liability, costs, attorney's fees, and expenses of whatsoever kind or character plaintiff might sustain or incur by reason of the execution of said bonds,

including attorney's fees incurred in the enforcement of their indemnity agreement. A duplicated copy of said agreement is attached hereto, and made a part hereof, as Exhibit D.

- 3. By paragraph 8 of their indemnity agreement, Exhibit D, defendants Edward J. Jowdy and Joan Jowdy agreed that vouchers or other evidence of the payments made by plaintiff in settlement of its liability under said bonds, and for expenses incurred therein, should be prima facia evidence of the fact and extent of the liability of Gelb, and of their liability to plaintiff for such loss and expense.
- 4. By reason of Gelb's failure to pay for the cigarette tax stamps purchased by it from the New York State Tax Commission and the tax commissioner of the State of Connecticut, as aforesaid, it breached the conditions of said bonds, and plaintiff was required to, and did, make the following payments in settlement of the claims made on said bonds:

December 27, 1971 to New York State Tax Commission \$8,987.60

January 31, 1972 to tax commissioner of State of

Connecticut \$82,803.22
\$91,790.82

- 5. Plaintiff has been compelled to employ an attorney to represent it in the determination and settlement of the claims made on the Gelb's cigarette tax payment bonds, on which plaintiff is surety, as aforesaid, and to bring this action to enforce the terms of the indemnity agreement executed by defendants Edward J. Jowdy and Joan Jowdy (Exhibit D), and the plaintiff is incurring counsel fees, the amount of which cannot be determined at this time.
- 6. Defendants Edward J. Jowdy and Joan Jowdy owe plaintiff \$91,790.82, plus interest thereon at the rate provided by law, and costs and attorney's fees to be determined at the trial of this case, and said defendants have failed and refused to pay any part thereof, although

payment has been duly demanded.

WHEREFORE, plaintiff demands judgment against all defendants in the sum of \$91,790.82, with interest on the sum of \$8,987.60 from December 27, 1971, and on the sum of \$82,803.22 from January 31, 1972, plus the amount of its attorney's fees incurred to be determined at the time of judgment, together with the costs of this action.

Elmer W. Beasley
880 Asylum Avenue

Hartford, Connecticut 06105 Telephone 525-2752

Attorney for Plaintiff.

INSURANCE COMPANY OF NORTH AMERICA

PHILADELPHIA, PA.

Bood No. M 59 19 40	
Amount \$ 100,000	10 9-34-70
Premium \$ 687.50	To 9-37
Name of Applicant (Principal) GELB EROS. & ZU	
Residence	when and where incorparated.)
Business Address 14 Beckley Avenue, S	temford, Connecticut
Character of Applicant's Business Cigarette Distrib	utor How Long Engaged Therein
Give exact title of firm, organization or individual to whom be	and is given (Obligee)
State of Connecticut	
Address 92 Farmington Avenue	, Hartford, Connecticut
Amount of bond or obligation required 3 100,000	
Give a complete description of the bond or obligation require	ed and furnish the form if possible
Tobacco Tax Bond	
From what date is bond or obligation to be written? July	7 1, 1970 For what term? June 30, 1974
Have you previously given bond? Yes If so, with	what Surety?INA
Do you carry Public Liability and Workmen's Compensation	n Insurance?If so, state name of Company, Policy
Limits and expiration date	
	ant as of 19
Cash on hand	Notes Payable (When due! For what!)
Cash in Bank	Account Burney
Stocks, Bonds, etc.,	Accounts Payable
(Give complete list with present Market Value)	Taxes:
	Due
	Reserve
Accounts Receivable	
(When due? Ace they all good?)	Borrowed or due on Stocks and Bonds Borrowed or due on Real Estate
Inventory	EXHIBIT-H
Notes Receivable	13
(When due! How secure!! Are sher shee!!)	Encumbrance on Plant

out reservation, and in consideration of the INSURANCE ("Surety"), becoming Surety, or procuring other Surety upon for or any successory Obligation(s) and for any continuation successors and assigns, to pay in advance the premiums or fer DOLL.	COMPANY OF NO its full or partial inde in thereof, hereby covers less hereinafter agreed	ORTH AMERICA (emnity, on the Obligate enant(s) and agree(s)	hereinafter called the ion(s) herein applied) with the Surety, its
Surety is discharged or released in the manner provided by I having procured the execution upon its full or partial Indemnigation(s) and for any continuation thereof, and all matters a due and satisfactory proof, by evidence legally competent, of	aw from any and all li lity, the Obligation(s) rising therefrom, or u	ability by reason of h herein applied for or intil the Surety shall	aving executed, or of any successory Obli-
And the undersigned do(es) further agree to comply protection, and to fully indemnify the Surety from and again and expenses of whatever kind or nature which the Surety sput to, by reason or in consequence of the Surety having expensed for or any successory Obligation(s) and for any evidence of any loss, costs and expenses, paid in good faith by gation(s) or any successory Obligation(s) and for any continus shall be prima facie evidence of the fact and extent of liabilitions, administrators, successors and assigns of the undersigned	nst any and all loss, of hall or may, for any xecuted or procured to continuation thereof the Surety on account uation thereof, wheth ity of the undersigned	costs, charges, suits, decause, at any time, so the execution of said f, provided that any at of any asserted liab ther it was actually light	damages, counsel fees ustain or incur or be Obligation(s) herein y voucher or other ility under said Obli- able therefor or not,
And the undersigned do(es) further expressly waive the entitled under law and do(es) further agree that, if any suit cessory Obligation(s) and for any continuation thereof, the Sito repay to the Surety the fees of said counsel or attorney a the defense of such suit.	is brought on the Olurety may employ co	oligation(s) herein ap	plied for or any suc- defend such suit and
Dated at Stanford, Connecticut			
this lst day of July, 19-70. 1111 Knell L. Cree Witness	Signature o	5. & ZUCKERMAN,	co-partnership
Attest:	BYX	Cart & curpor	- 1/1.
		Applicant, A corpor	ration
AGREEMENT.—To be executed by the Executive Officers indemnitors.	of said Corporation	in their individual ca	pacities, or by other
In consideration of the INSURANCE COMPANY of and in consideration of the sum of One Dollar to the undersindemnity agreement.		이 이 이 사고 하게 되었다. 그리고 있는데 아니라는데 이 살아 있다면 하는데 없다. 이 없는데 이 이 없었다. 나를 다 없다.	얼마 프로스테이지 하나 되었다면서 이 생님이 생각하면 하나 네 네네이지 하나 있다고 하다? 네네
Witness our hands and seals at	_this	day of	, 19
Witness:	Indemnitor:		
			(Seal)
			(Sear)
NOTE—Power-of-attorney must accompany this application When executed by a co-partnership, each member r Executions by Corporations must be by officers, dul attorney to bind the Company to indemnifying agre	must sign his name. y authorized, only, an	d not by representati	
Stateman	it of Agent		
NOTE—Agent is requested to state his personal known mation given in above application; also to give such other references, etc., as will assist the Company in its judgment.	wledge of applicant, a	and to verify, as far a	is possible, the infor- ding of applicant or
			
			14

INSURANCE COMPANY OF NORTH AMERICA PHILADELPHIA, PA.

Bond No. M 65 19 00

Amount \$ 15,000	
Premium \$180.00	
100.00	
Name of Applicant (Principal) GELB	EROS. & ZUCKEPMAN, INC.
Residence	poration, state when and where incorporated.)
Business Address	Avenue, Starford, Connecticut
Character of Applicant's Business	How Long Engaged Therein
Give exact title of firm, organization or individual t	to whom bond is given (Obligee)
STATE OF N	YEW YORK
Address ALBANY, NE	
Amount of bond or obligation required \$ _ 15,000	
ave a complete description of the bond or obligat	tion required and furnish the form if possible
CREDIT BOND	FOR AGENT TO AFFIX CIGARETTE STAMPS
rom what date is bond or obligation to be written	September 24, 1970 For what term? Open
	If so, with what Surety? TIA
o you carry Public Liability and Workmen's Co	impensation Insurance? If so, state name of Company, Policy
imits and expiration data.	and so, state maine of company, roney
imits and expiration date	
Figure ial St. tament of	f Applicant cont
	Applicant as of19
	Notes Payable
ash on handash in Bank	Notes Payable
ash on hand ash in Bank tocks, Bonds, etc.,	Notes Payable (when don't For what!) Accounts Payable
ash on hand ash in Bank tocks, Bonds, etc., (Give complete list with present Market Value)	Notes Payable (When doe? For relat!) Accounts Payable (When doe?)
ash on hand ash in Bank tocks, Bonds, etc., (Give complete list with present Market Value)	Notes Payable (When dee? For vhait) Accounts Payable (When dee?) Taxes:
ash on hand ash in Bank tocks, Bonds, etc., (Give complete list with present Market Value)	Notes Payable (When dee? For what?) Accounts Payable (When dee?) Taxes:
ash on hand ash in Bank tocks, Bonds, etc., (Give complete list with present Market Value)	Notes Payable (When dee? For what?) Accounts Payable (When dee?) Taxes: Due Reserve
ash on hand ash in Bank tocks, Bonds, etc., (Give complete list with present Market Value)	Notes Payable (When dee? For relat!) Accounts Payable (When dee?) Taxes: Due Reserve
ash on hand ash in Bank tocks, Bonds, etc., (Give complete list with present Market Value) ccounts Receivable (When due? Are they all good?)	Notes Payable (When dee? For what?) Accounts Payable (When dee?) Taxes: Due Reserve Berrowed or due on Stocks and Bonds
ash on hand ash in Bank tocks, Bonds, etc., (Give complete list with present Market Value) coountg Receivable (When due? Are they all gold?)	Notes Payable (When deef For what?) Accounts Payable (When deef) Taxes: Due Reserve Berrowed or due on Stocks and Bonds Borrowed or due on Paal Estate
ash on hand ash in Bank tocks, Bonds, etc., (Give complete list with present Market Value) coounta Receivable (When due? Are they all gold?)	Notes Payable (When deef For what!) Accounts Payable (When deef) Taxes: Due Reserve Berrowed or due on Stocks and Bonds Borrowed or due on Paal Estate
ash on hand ash in Bank tocks, Bonds, etc., (Give complete list with present Market Value) coounts Receivable (When due? Are they all good?)	Notes Payable (When deef For what) Accounts Payable (When deef) Taxes: Due Reserve Berrowed or due on Stocks and Bonds Borrowed or due on Payable Estate

The undersigned hereby affirm(s) that the statements contained in the foregoing application are true and were made with- reservation, and in consideration of the INSURANCE COMPANY OF NORTH AMERICA (hereinafter called the rety"), becoming Surety, or procuring other Surety upon its full or partial indemnity, on the Obligation(s) herein applied or any successory Obligation(s) and for any continuation thereof, hereby covenant(s) and agree(s) with the Surety, its ressors and assigns, to pay in advance the premiums or fees hereinafter agreed upon, namely, DOLLARS (\$
ty is discharged or released in the manner provided by law from any and all liability by reason of having executed, or of any procured the execution upon its full or partial Indemnity, the Obligation(s) herein applied for or any successory Obligation(s) and for any continuation thereof, and all matters arising therefrom, or until the Surety shall have been furnished and satisfactory proof, by evidence legally competent, of such discharge and release.
And the undersigned do(es) further agree to comply with all the conditions established by the Surety for its own extion, and to fully indemnify the Surety from and against any and all loss, costs, charges, suits, damages, counsel fees expenses of whatever kind or nature which the Surety shall or may, for any cause, at any time, sustain or incur or be to, by reason or in consequence of the Surety having executed or procured the execution of said Obligation(s) herein ed for or any successory Obligation(s) and for any continuation thereof, provided that any voucher or other ence of any loss, costs and expenses, paid in good faith by the Surety on account of any asserted liability under said Obligation(s) or any successory Obligation(s) and for any continuation thereof, whether it was actually liable therefor or not, be prima facie evidence of the fact and extent of liability of the undersigned, as well as of the respective heirs, execualministrators, successors and assigns of the undersigned.
And the undersigned do(es) further expressly waive the benefit of any exemption to which the undersigned may be led under law and do(es) further agree that, if any suit is brought on the Obligation(s) herein applied for or any sucry Obligation(s) and for any continuation thereof, the Surety may employ counsel or attorney to defend such suit and pay to the Surety the fees of said counsel or attorney and all other costs and expenses which the Surety may incur in refense of such suit.
Dated at Stamford, Connecticut
this 24th day of September , 19 70 .
Witness Symmetry of Applicant, if individual or co-arthership
Signatory of Applicage it corporation
EEMENT: - To be executed by the Executive Officers of said Corporation in their individual capacities, or by other indemnitors.
In consideration of the INSURANCE COMPANY OF NORTH AMERICA executing the bond herein applied for a consideration of the sum of One Dollar to the undersigned in hand paid, we jointly and severally join in the foregoing unity agreement.
Witness our hands and seals at
this
(Séal)
E-Power-of-attorney must accompany this application when other than the principal signs as an individual. When executed by a co-partnership, each member must sign his name. Executions by Corporations must be by officers, dely authorized, only, and not by representatives, unless Power-of-attorney to bind the Company to indomnifying a greenents accompanies application.
Statement of Agent
NOTE -Agent is requested to state his personal knowledge of applicant, and to verify, as far as possible, the information in above application; also to give such other information requesting the risk, the standing of applicant or aces, etc., as will assist the Company in its judgment.

FILED How 13 9 55 AH '73 U.S. SISTHICT COURT HASTFO D. CONN.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

22 * 500 =

ordered.

judgment/form.

file proposed judg

debt, shall

fidavits of plaintiff si together wi

the law

days,

affidavits

plaintiff's

rees.

costs and attorney's

SINSURANCE COMPANY OF NORTH AMERICA,) Plaintiff,) DIS U.S. 品

vs.

GELB BROS. & ZUCKERMAN, INC., JAMES J. JOWDY, JACQUELINE JOWDY, EDWARD J. JOWDY, and JOAN JOWDY, Defendants.)

CIVIL ACTION FILE NO. H 124

NOTICE OF MOTION.

To: Mark A. Asmar Louis F. Green Arthur N. Greenblatt, Esquires One Constitution Plaza Hartford, Connecticut 06103 ·

Attorneys for Defendants.

Please take notice, that upon the pleadings on file herein, and upon the supporting affidavit of Ronald W. Stewart served herewith, plaintiff will move this Court, before Hon. T. Emmet Clarie, United States District Judge, at South Court Room, United States Courthouse, 450 Main Street, Hartford, Connecticut, on the third day of December, 1973, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, pursuant to Rule 56 (a), (c) and (e), Federal Rules of Civil Procedure, to enter summary judgment in favor of plaintiff, and against the defendants, for the relief demanded in the complaint, on the ground that there is no genuine issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law.

Dated November 12, 1973.

Elmer W. Beasley 900 Asylum Avenue Hartford, Connecticut 06105

Telephone ?^3 525-2752

Attorney for Plaintiff.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

U.S. CIST. ICT COURT
HAS THO D. CONN.

Plaintiff.)

VS.

CIVIL ACTION
FILE NO. H 124

GELB BROS. & ZUCKERMAN, INC.,

JAMES J. JOWDY, JACQUELINE JOWDY,

EDWARD J. JOWDY, and JOAN JOWDY,

Defendants.)

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NOTICE OF MOTION.

To; Mark A. Asmar
Louis F. Green
Arthur N. Greenblatt, Esquires
One Constitution Plaza
Hartford, Connecticut 06103

Attorneys for Defendants.

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Dated November 12, 1973.

the to illness of plaintiff's counil, the time for filing proposed indings of fact and conclusions of iw, together with a proposed judgint, is extended to January 14, 1979. ordered."

12/10/73

900 Asylum Ayenue Hartford, Connecticut 06105
Telephone 203 525-2752

A TRUE COPY Attorney for Plaintiff.

__ATTEST Sylvester A. Markowski Clerk

By Deputy Clerk

18

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

INSURANCE COMPANY OF NORTH AMERICA,)
Plaintiff.)

VS.

CIVIL ACTION FILE NO. H 144

GELB BROS. & ZUCKERMAN, INC., JAMES J. JOWDY, JACCUELINE JOWDY, EDWARD J. JOWDY, and JOAN JOWDY,

Defendants.)

AFFIDAVIT SUPPORTING MOTION FOR SUMMARY JUDGMENT.

STATE OF CONNECTICUT) ...

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Ronald W. Stewart, being first duly sworn, on oath, deposes and says:

I. I am a claim supervisor in the Policyholders Service

Department of Insurance Company of North America, in its New Haven

Office, the plaintiff in the above entitled action; I personally handled

the claims made by the State of Connecticut and the State of New York

which gave rise to the present action; I have personal knowledge of

the facts hereinafter stated; and I am authorised to make this affi
davit is plaintiff's behalf.

The Bonds Involved In Action.

2. Gelb Bros. & Zuckerman, Inc. (Gelb), made application to the tax commissioner of the State of Connecticut for a license to

engage in the business of a cigarette distributor under the provisions of Chapter 214 of the Connecticut General Statutes, \$\$ 12-85 - 12-330, for the period commencing July 1, 1970, and ending June 30, 1971.

- 3. At Gelb's special instance and request, plaintiff became surety on the tax payment bond which Gelb was required to give to the tax commissioner of the State of Connecticut in the penal sum of \$100,000; which bond was dated June 16, 1970, and was conditioned that Gelb should pay all taxes, interest, and penalties in accordance with the provisions of the statute pertaining to such business. Said bond is identified on plaintiff's records as M 59 19 40.
- 4. Gelb also applied to the New York State Tax Commission for a permit to purchase cigarette stamps on credit, and pay for such stamps within thirty days after the date of purchase, pursuant to Article 20 of the New York Tax Law.
- 5. At Gelb's special instance and request, plaintiff became surety on the Cigarette Credit Bond which Gelb was required to give to the New York State Tax Commission in the penal sum of \$15,000; which bond was dated September 24, 1970, and was conditioned that Gelb should pay to the New York State Tax Commission all sums due for eigerette stamps purchased by it, including penalties and interest, within thirty days after the purchase thereof. Said bond is identified on plaintiff's records as M 65 19 No.

Defendants' Agreements To Indomnify Plaintiff.

6. In consideration of plaintiff agreeing to become surety on Gelb's Tax Payment Bond given to the tax commissioner of the State of Connecticut, Gelb executed and delivered to plaintiff a written application and agreement of indemnity, dated July 1, 1970, wherein Gelb agreed as follows:

And the undersigned does further agree ** to fully indemnily the Surety from and against any and all loss, costs, charges, suits, damages, counsel fees and expenses of whatever kind or nature which the Surety shall or may, for any cause, at any time, sustain or incur or be put to, by reason or in consequence of the Surety having executed ** said Obligation herein applied for **, provided that any voucher or other evidence of any loss, costs and expenses, paid in good faith by the Surety on account of any asserted liability under said obligation **, whether it was actually liable therefor or not, shall be prima facie evidence of the fact and extent of liability of the undersigned, ***.

A duplicated copy of said application and agreement of indemnity is attached to the complaint herein, as Exhibit A, and I refer to Exhibit A, and incorporate it herein by reference, and make it a part hereof, to the same extent as if it were fully set forth herein.

7. In consideration of plaintiff agreeing to become surety on Gelb's New York State Cigarette Credit Bond, given to the New York State Tax Commission, Gelb executed and delivered to plaintiff an application, containing an agreement of indemnity, dated September 24, 1970, which contained a provision identical with the provision quoted above. A duplicated copy of that application and indemnity agreement

is attached to the complaint herein as Exhibit B, and I refer to Exhibit B, and incorporate it berein by this reference, and make it a part hereof, to the same extent as if it were fully set forth herein. B. In consideration of plaintiff agreeing to become surety on Gelb's Tax Payment Bond given to the tax commissioner of the State of Connecticut and on the New York State Cigarette Credit Bond given to the New York State Tax Commission, defendants James J. Jowdy and Jacqueline Jowdy executed and delivered to plaintiff their indemnity agreement, dated July 1, 1970, wherein and whereby they jointly and severally agreed, so far as relevant to this action, as follows: 3. That the indemnitor will perform all the obligations of any such bond(s) and will at all times indemnify and keep indemnified the Company from and against every claim, demand, loss, liability, cost, charge, attorneys' fees, espense, suit, order, judgment or adjudication that

- the Company shall or may for any cause at any time sustain, or incur or become subject to by reason of executing any such bond(s).
- 4. That the indemnitor's liability bereunder shall, without however limiting the indemnity provided in the preceding paragraph, extend to and include all costs, expenses, and attorneys' fees incurred or sustained by the Company in making any investigation on account of any such bend(s), in prosecuting or defending any action brought in connection therewith, in abtaining or seeking to obtain a release therefrom and in enforcing any of the agreements herein contained. (Emphasis supplied).
- 8. That in the event of payment, settlement or compromise in good faith of any claim, demand, loss, liability, cost, charge, attorne, s' tee, expense, suit, order, judgment

9. In consideration of plaintiff agreeing to become surety on Gelb's Tax Payment Bond given to the tax commissioner of the State of Connecticut, and on its New York State Cigarette Credit Bond given to the New York State Tax Commission, defendants Edward J. Jowdy and Joan Jowdy executed and delivered to plaintiff their indemnity agreement, dated July 1, 1970, which contained provisions identical with those quoted above. A duplicated copy of that indemnity agreement is attached hereto, incorporated herein by reference, and made a part hereof, as Exhibit B.

Gelb's Defaults Under Bonds And Surety's Lass.

cigarette stamps from the tax commissioner of the State of Connecticut to be attached to the cigarettes which it distributed or sold under the previsions of its permit, and it breached the terms and conditions of its Tax Fayment B. nd, in that it failed to pay the value of the stamps so purchased, in consequence of which the tax commissioner

of the State of C meeticut made claim against plaintiff for the balance due and owing by Gelb for the tax stamps so purchased by it; and plaintiff was required to, and did on January 21, 1972, pay the tax commissioner of the State of Connecticut the sum of \$82,803.22 in discharge of the obligations of its bond. A duplicated copy of the official receipt of the State of Connecticut, acknowledging receipt of plaintiff's draft for \$82,303... in payment of the claim it made against plaintiff on Gelb's bond, dated February 2, 1972, is attached hereto, incorporated herein by reference, and made a part hereof, as Exhibit C.

rette Gredit Bend, in that it purchased cigarette stamps from the State Tax Commission on credit, and it failed to pay for such stamps within thirty days after the purchase thereof, as required by the bond; in consequence of which the New York State Tax C. mmission made claim against plaintiff for the amount due and ewing by Gelb for such stamps; and plaintiff was required to, and did on December 27, 1971, pay the New York State Tax Commission the sum of \$8,987.60 in discharge of the obligation of its bend. A duplicated copy of the official receipt of the New York State Tax C mmission, dated December 30, 1971, by which it acknowledged receipt of plaintiff's draft for \$8,987.60, is attached hereto, incorporated

herein by reference, and made a part hereof, as Eshibit D.

Attorney's Fees And Expenses Incurred By Surety.

- 12. Plaintiff was compelled to employ an attorney to investigate the claims made against it by the tax commissioner of the State of Connecticut and the New York State Tax Commission, to determine the validity of the claims, to review the audits of Gelb's accounts which were made by both claimants, and determine the proper amount of plaintiff's liability under the respective bonds, to confer with Gelb and defendants Fdward J. Jowdy and James J. Jowdy respecting the propriety of the claims and in an effort to prevail on defendants to perform the obligations under the bonds, in accordance with the terms of their indemnity agreements, before plaintiff was required to respond as surety, and finally to negotiate with the respective claimants for settlement of the claims, without litigation, to discharge plaintiff's obligations under the bonds.
- 13. Plaintiff has incurred, and has obligated itself to pay, its attorney for services rendered from October 20, 1971, to May 2, 1973, in the investigation and settlement of the two claims made against its bonds, as described in the preceding paragraph, and, after payment of the claims by plaintiff, in trying to collect its loss and expenses from defendants, again without litigation, in the sum of \$5, 250,00.

 A copy of the attorney's time records, showing the dates and nature of services rendered is attached hereto, incorporated herein by reter-

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ence, and made a part hereof, as Exhibit F.

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- atterney for his services rendered in bringing this action against defendants to enforce the provisions of their indemnity agreements, which fees are specifically provided for in paragraph 4 of Exhibits A and B attached hereto, and quoted in paragraph 8 hereof. On the basis of time expended in connection with this action, a reasonable fee in the amount of \$3,750.00 is claimed by plaintiff's attorney.
- 15. Plaintiff has incurred, and has obligated itself to pay.

 its atterney for his out of pocket expenses which he paid in connection with the investigation and settlement of the claims, which, exclusive of costs incurred and paid in connection with this specific action, amount in the aggregate to \$36.48. An itemized statement of those expenses is attached hereto, incorporated herein by reference, and made a part hereof, as Exhibit F.

Summary Statement of Plaintiff's Claim Against Defendants.

16. The following chart will show plaintiff's claim for which judgment is requested, exclusive of the costs of this action:

Dec. 27, 1971 N.Y. State Tax Commission loss	\$ 8,987.60
Dec. 27, 1971, to Nov. 26, 1973 - Interest . 8%	1, 378.07
Jan. 31, 1972 Conn. Tax Commissioner loss	82, 803, 22
Jan. 31, 1972, to Nov. 26, 1973 - Interest & 8%	12, 144. 43
Losses and accrued interest	105, 313, 32
Oct. 20, 1971, to May 2, 1973 Attorney's fees	
incurred	5, 250.00
July 1, 1973, to date of judgment - Attorney's fees	
incurred in this action	3, 750.00
Oct. 20, 1971, to date - Expenses paid by plaintiff's	
attorney for plaintiff's account	36.48
Loss, interest on loss, attorney's fees and expenses	114, 349. 80

vices rendered in this matter to date and for his cut of pocket expenses is that the attorney customarily withholds a statement for his services until the conclusion of the case. The fees charged by plaintiff's attorney in this case are in line with his fees charged in other cases he has handled for plaintiff, in which I have been involved, and I consider the fees charged in this case to be reasonable for the services readered and to be rendered.

18. All of the documents and papers annexed hereto as echibite are true and correct duplicated copies of the originals, or copies as the case may be, of those documents and papers which appear in plaintiff's files.

Deponent

Subscribed and sworn to before me this eighth day of Nevember, 1973.

Elmer V. Bezolo,

Commissioner of Superior Court.

INSURANCE COMPANY OF NORTH AMERICA

PHILADELPHIA, PA.

INDEMNITY AGREEMENT

For all types of bonds other than Contract.

THIS AGREEMENT, made t	hislstday of	_July	, 19_70_, by and between
	James J. Jow		
	Jacqueline_J	ovdy	· · · · · · · · · · · · · · · · · · ·
, 			
(hereinafter called the Indemnitor corporation with its head office a witnesseth:			
WHEREAS the Company moligations of suretyship or guara			te bond(s), undertakings and behalf of
GELB EROS	. & ZUCKERMAN, INC.		
of (P. O. Address) 14 Beckle		Connecticut	06901
(hereinafter called the Principal)	and •		
WHEREAS the Indemnitor is	financially or otherwise in	nterested in the	e affairs of the Principal and is,

WHEREAS the Indemnitor is financially or otherwise interested in the affairs of the Principal and is, therefore, interested in enabling the Principal to procure the prompt and ready execution of such bond(s) by the Company; and

WHEREAS to accomplish such purpose the Indemnitor is willing to execute this continuing agreement of indemnity (until revoked as hereinafter set forth) which shall have the same force and effect as if the Indemnitor had executed a separate indemnity agreement, in all respects similarly conditioned, in connection with each such bond executed by the Company for the Principal:

NOW, THEREFORE, in consideration of the premises and the sum of One Dollar in hand paid by the Company to the Indemnitor, receipt whereof is hereby acknowledged, the Indemnitor hereby agrees for himself or itself and his or its heirs, executors, administrators, successors and assigns as follows:

- 1. That all the terms, provisions, conditions and agreements herein contained shall be binding and obligatory upon the Indemnitor with respect to any such bond(s) hereafter executed by the Company for the Principal, which bond(s) shall be deemed to have been executed by the Company at the request in each instance of the Principal and the Indemnitor.
- 2. That the Indemnitor will pay or cause to be paid to the Company upon the execution of each such bond a premium computed at the applicable schedule of rates published by the Company and in effect on the date such bond becomes effective and to pay or cause to be paid in advance all subsequent, annual or other premiums at said rates until all liability under each such bond shall have terminated and the Company shall have received satisfactory evidence of such termination.
- 3. That the Indemnitor will perform all the obligations of any such bond(s) and will at all times indemnify and keep indemnified the Company from and against every claim, demand, loss, liability, cost, charge, attorneys' fee, expense, suit, order, judgment or adjudication that the Company shall or may for any cause at any time sustain, incur or become subject to by reason of executing any such bond(s).
- 4. That the Indemnitor's liability hereunder shall, without however limiting the indemnity provided in the preceding paragraph, extend to and include all costs, expenses and attorneys' fees incurred or sustained by the Company in making any investigation on account of any such bond(s), in prosecuting or defending any action brought in connection therewith, in obtaining or seeking to obtain a release therefrom and in enforcing any of the agreements herein contained.

- 5. That the use by the Company of a renewal certificate or other instrument for the purpose of extending the term of any such bond(s) shall impose liability upon the Indemnitor hereunder as if the bond(s) continued in effect as extended by its terms.
- 6. That the Company is hereby authorized, but not required, to make or consent to any change of any kind whatsoever in any such bond(s) whether given in connection with a contract or otherwise, without notice to or consent by the Indemnitor.
- 7. That in any action brought against the Principal alone, the outcome of which might affect the liability of the Company or in any action in which both Principal and Company are parties, notwith-standing the fact that the Principal may have engaged counsel to represent him or it and the Company, or either of them, the Company shall have the right to retain its own counsel if in its sole opinion the protection of its interests require it to do so, and all costs, expenses and attorneys' fees incurred or sustained thereby shall be a liability of the Indemnitor hereunder.
- 8. That in the event of payment, settlement or compromise in good faith of any claim, demand, loss, liability, cost, charge, attorneys' fee, expense, suit, order, judgment or adjudication in connection with any such bond(s), an itemized statement thereof sworn to by an officer or officers of the Company or the voucher or vouchers or other evidence of such payment, settlement or compromise shall be prima facie evidence of the fact and extent of the liability of the Principal; and the Company shall have the right in good faith to pay, settle or compromise, or litigate any such claim, demand, loss, liability, cost, charge, attorneys' fee, expense, suit, order judgment or adjudication under e belief that it is liable therefor, whether liable or not, without the consent or approval of the indemnitor unless the Indemnitor shall protest in writing and shall simultaneously with such protest deposit with the Company collateral satisfactory to it sufficient to pay and satisfy such claim, demand, loss, liability, cost, charge, attorneys' fee, expense, suit, order, judgment or adjudication and any judgment or judgments as may result with interest, costs, expenses and attorneys' fee.
- 9. That in the event the Company is required to reserve from its assets an amount to cover any claim, demand, liability, expense, suit, order, judgment or adjudication under any such bond(s) by reason of the breach or default of the bond(s) related thereto, the Indemnitor hereby covenants and agrees immediately on demand to deposit with the Company in current funds an amount equal to such reserve as collateral security to be held by the Company for its indemnification without derogation of any other rights to indemnity afforded by this instrument, and if the Company is required to enforce performance of this covenant by action at law or in equity, the costs, charges and expenses, including attorneys' fees, which it may incur shall be included in such action and paid by the Indomnitor.
- 10. That the Indemnitor shall waive and does hereby waive, so far as liability under this indemnity agreement is concerned, all rights to claim any property, including homesteads, as exempt from levy, execution, sale or other legal process under the law of any state or states.
- 11. That in the event the Company executes any such bond(s) with cosurety or cosureties or reinsures all or any part of such bond(s), all the terms and provisions of this agreement shall apply and operate for the benefit of such cosureties and such reinsurers as their interests may appear.
- 12. That separate suits may be brought hereunder as causes of action accrue, and the bringing of suit or the recovery of judgment upon any cause of action shall not prejudice or bar the bringing of other suits upon other causes of action whether theretofore or thereafter arising.
- 13. That the Indemnitor hereby waives notice of the execution of any such bond(s) and of any and all matters affecting the liability of the Company under any such bond(s).
- 14. That in case any person expected to sign this agreement of indemnity or any of the parties mentioned herein fails to execute the same, or in case the execution hereof by any of the parties be defective or invalid for any reason, such failure, defect or invalidity shall not in any manner affect the validity of this agreement of indemnity or the liability hereunder of any of the parties executing the same, but each and every party so executing shall be and remain fully bound and liable hereunder to the same extent as if such failure, defect or invalidity had not existed.
- 15. That the failure of the Company to insist upon strict compliance with any of the terms hereof shall not be considered to be a waiver of any of such terms nor shall it militate against the right of the Company to insist upon strict compliance herewith at any time thereafter whether in connection with the same or any other bond(s) executed in reliance hereon.

- 16. That this agreement shall remain in full force and effect until ten days after receipt by the Company of written notice by registered mail addressed to the Bonding Department of the Company at its head office at 1600 Arch Street, Philadelphia, Pennsylvania, revoking this agreement of indemnity, the Indemnitor to have no liability under this agreement with respect to bond(s) executed by the Company for the Principal after the effective date of such notice but to remain bound under this agreement with respect to bond(s) executed prior to the effective date of such notice.
- 17. That the taking by the Company from the Indemnitor of a specific indemnity agreement or agreements in connection with a bond executed for the Principal shall in no way affect the operation of this general indemnity agreement whether as to bonds theretofore or thereafter executed for the Principal.
- 18. That if this agreement shall be signed by two or more Indemnitors, the word "Indemnitor," whenever it appears herein, shall be considered to read "Indemnitors," and any grammatical changes in the accompanying text necessitated by such pluralizing of the word "Indemnitor" shall be considered to have been made. When two or more Indemnitors sign this agreement they shall both or all be bound hereunder jointly and severally. The termination of this agreement as to any one of two or more Indemnitors shall not relieve the others unless they shall join in the notice of termination.
- 19. That if any provision of this agreement shall be contrary to the laws of any state in which the same shall be sought to be enforced, the illegality or unenforceability of any such provision shall not affect the other terms, covenants and conditions hereof, and the same shall be binding upon the Indemnitor with the same force and effect as though such illegal or unenforceable provision were not contained herein.

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SIGNED, SEALED and DATE	this_lst_d	ay of Ju	ly ,	1970
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//	Attest or Witness	J.J.J.	1)	Indemnitor
P. O. Address		P. O. Address		
milded LC	ice	.7 C. Lerci	1: C.	?
P. O. Address	1	J.J. P. O. Address		Indemnitor
		•		
	Attest or Witness			Internitor
P. O. Address		P. O. Address.		· · · · · ·

	, ss.: ,		
COUNTY OF FAIRFIELD	_		
On this 1st day of	July	19 70 , before me personal	ly came :
	T. Taudu Tasawalina I	ovd.	
o me known and known to me	J. Jowdy, Jacqueline J to be the person described		regoing
instrument, and he thereupon a	knowledged to me that he	executed the same.	
		. 00	
	- Mil	and I Cree	
STATE OF	_ \	Notary Public	
	- ss.:		
COUNTY OF	-)		0
On thisday of	, 19	, before me personally a	ppeared
			,
o me known, who being by me de	ly sworn, did depose and sa	y: that he resides in the	
hat he is the			
he corporation described in and real of said corporation; that the was affixed by order of the Boar hereto by like order.	e seal affixed to said instru	ment is such corporate seal;	that it
		Notary Public	_
TATE OF			
	\ ss.:		
COUNTY OF			
	- '		
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On thisday of	,	19, before me personal	ly came
	- '	19, before me personal	ly came
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INSURANCE COMPANY OF NORTH AMERICA

PHILADELPHIA, PA.

INDEMNITY AGREEMENT

For all types of bonds other than Contract.

10 H.O. 70

THIS AGREEMENT, made this 1st day of July , 19 70, by and between
Edward J. Jowdy
(full name of Indemnitor)
Joan Jowdy
0
(hereinafter called the Indemnitor) and INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvania corporation with its head office at 1600 Arch Street. Philadelphia, (hereinafter called the Company) witnesseth:
WHEREAS the Company may from time to time hereafter execute bond(s), undertakings and obligations of suretyship or guarantee (all hereinafter called bond(s)) on behalf of
GELB BROS. & ZUCKERMAN, INC.
of (P. O. Address) 14 Beckley Avenue, Stanford, Connecticut 06901 (hereinafter called the Principal); and
WHEREAS the Indemnitor is financially or otherwise interested in the affairs of the Principal and is, therefore, interested in enabling the Principal to produce the prompt and ready execution of such bond(s) by the Company; and
WHEREAS to accomplish such purpose the Indemnitor is willing to execute this continuing agreement of indemnity (until revoked as hereinafter set forth) which shall have the same force and effect as if the Indemnitor had executed a separate indemnity agreement, in all respects similarly conditioned, in connection with each such bond executed by the Company for the Principal:
NOW, THEREFORE, in consideration of the premises and the sum of the Dollar in hand paid by the Company to the Indemnitor, receipt whereof is hereby acknowledged, the Indemnitor hereby agrees

for himself or itself and his or its heirs, executors, administrators, successors and assigns as follows:

- 1. That all the terms, provisions, conditions and agreements herein contained shall be binding and obligatory upon the Indemnitor with respect to any such bond(s) hereafter executed by the Company for the Principal, which bond(s) shall be deemed to have been executed by the Company at the request in each instance of the Principal and the Indemnitor.
- 2. That the Indemnitor will pay or cause to be paid to the Company upon the execution of each such bond a premium computed at the applicable schedule of rates published by the Company and in effect on the date such bond becomes effective and to pay or cause to be paid in advance all subsequent, annual or other premiums at said rates until all liability under each such bond shall have terminated and the Company shall have received satisfactory evidence of such termination.
- 3. That the Indemnitor will perform all the obligations of any such bond(s) and will at all times indemnify and keep indemnified the Company from and against every claim, demand, loss, liability, cost, charge, attorneys' fee, expense, suit, order, judgment or adjudication that the Company shall or may for any cause at any time sustain, incur or become subject to by reason of executing any such bond(s).
- 4. That the Indemnitor's liability hereunder shall, without however limiting the indemnity provided in the preceding paragraph, extend to and include all costs, expenses and attorneys' fees incurred or sustained by the Company in making any investigation on account of any such bond(s), in prosecuting or defending any action brought in connection therewith, in obtaining or seeking to obtain a release therefrom and in enforcing any of the agreements herein contained.

- 5. That the use by the Company of a renewal certificate or other instrument for the purpose of extending the term of any such bond(s) shall impose liability upon the Indemnitor hereunder as if the bond(s) continued in effect as extended by its terms.
- 6. That the Company is hereby authorized, but not required, to make or consent to any change of any kind whatsoever in any such bond(s) whether given in connection with a contract or otherwise, without notice to or consent by the Indemnitor.
- 7. That in any action brought against the Principal alone, the outcome of which might affect the liability of the Company or in any action in which both Principal and Company are parties, notwith-standing the fact that the Principal may have engaged counsel to represent him or it and the Company, or either of them, the Company shall have the right to retain its own counsel if in its sole opinion the protection of its interests require it to do so, and all costs, expenses and attorneys' fees incurred or sustained thereby shall be a liability of the Indemnitor hereunder.
- 8. That in the event of payment, settlement or compromise in good faith of any claim, demand, loss, liability, cost, charge, attorneys' fee, expense, suit, order, judgment or adjudication in connection with any such bond(s), an itemized statement thereof sworn to by an officer or officers of the Company or the voucher or vouchers or other evidence of such payment, settlement or compromise shall be prima facie evidence of the fact and extent of the liability of the Principal; and the Company shall have the right in good faith to pay, settle or compromise, or litigate any such claim, demand, loss, liability, cost, charge, attorneys' fee, expense, suit, order, judgment or adjudication under the belief that it is liable therefor, whether liable or not, without the consent or approval of the Indemnitor unless the Indemnitor shall protest in writing and shall simultaneously with such protest deposit with the Company collateral satisfactory to it sufficient to pay and satisfy such claim, demand, loss, liability, cost, charge, attorneys' fee, expense, suit, order, judgment or adjudication and any judgment or judgments as may result with interest, costs, expenses and attorneys' fee.
- 9. That in the event the Company is required to reserve from its assets an amount to cover any claim, demand, liability, expense, suit, order, judgment or adjudication under any such bond(s) by reason of the breach or default of the bond(s) related thereto, the Indemnitor hereby covenants and agrees immediately on demand to deposit with the Company in current funds an amount equal to such reserve as collateral security to be held by the Company for its indemnification without derogation of any other rights to indemnity afforded by this instrument, and if the Company is required to enforce performance of this covenant by action at law or in equity, the costs, charges and expenses, including attorneys' fees, which it may incur shall be included in such action and paid by the Indemnitor.
- 10. That the Indemnitor shall waive and does hereby waive, so it as liability under this indemnity agreement is concerned, all rights to claim any property, including mesteads, as exempt from levy, execution, sale or other legal process under the law of any state or states.
- 11. That in the event the Company executes any such bond(s) with cosurety or cosureties or reinsures all or any part of such bond(s), all the terms and provisions of this agreement shall apply and operate for the benefit of such cosureties and such reinsurers as their interests may appear.
- 12. That separate suits may be brought hereunder as causes of action accrue, and the bringing of suit or the recovery of judgment upon any cause of action shall not prejudice or bar the bringing of other suits upon other causes of action whether theretofore or thereafter arising.
- 13. That the Indemnitor hereby waives notice of the execution of any such bond(s) and of any and all matters affecting the liability of the Company under any such bond(s).
- 14. That in case any person expected to sign this agreement of indemnity or any of the parties mentioned herein fails to execute the same, or in case the execution hereof by any of the parties be defective or invalid for any reason, such failure, defect or invalidity shall not in any manner affect the validity of this agreement of indemnity or the liability hereunder of any of the parties executing the same, but each and every party so executing shall be and remain fully bound and liable hereunder to the same extent as if such failure, defect or invalidity had not existed.
- 15. That the failure of the Company to insist upon strict compliance with any of the terms hereof shall not be considered to be a waiver of any of such terms nor shall it militate against the right of the Company to insist upon strict compliance herewith at any time thereafter whether in connection with the same or any other bond(s) executed in reliance hereon.

- 16. That this agreement shall remain in full force and effect until ten days after receipt by the Company of written notice by registered mail addressed to the Bonding Department of the Company at its head office at 1600 Arch Street, Philadelphia, Pennsylvania, revoking this agreement of indemnity, the Indemnitor to have no liability under this agreement with respect to bond(s) executed by the Company for the Principal after the effective date of such notice but to remain bound under this agreement with respect to bond(s) executed prior to the effective date of such notice.
- 17. That the taking by the Company from the Indemnitor of a specific indemnity agreement or agreements in connection with a bond executed for the Principal shall in no way affect the operation of this general indemnity agreement whether as to bonds theretofore or thereafter executed for the Principal.
- 18. That if this agreement shall be signed by two or more Indemnitors, the word "Indemnitor," whenever it appears herein, shall be considered to read "Indemnitors," and any grammatical changes in the accompanying text necessitated by such pluralizing of the word "Indemnitor" shall be considered to have been made. When two or more Indemnitors sign this agreement they shall both or all be bound hereunder jointly and severally. The termination of this agreement as to any one of two or more Indemnitors shall not relieve the others unless they shall join in the notice of termination.
- 19. That if any provision of this agreement shall be contrary to the laws of any state in which the same shall be sought to be enforced, the illegality or unenforceability of any such provision shall not affect the other terms, covenants and conditions hereof, and the same shall be binding upon the Indemnitor with the same force and effect as though such illegal or unenforceable provision were not contained herein.

20.

SIGNED, SEALED and DATED thislst	_day of	July	
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Mr. Conof L. Crec.	J. C.	en Jan-	1-7
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EVERETT C. PALUSKA

Deputy Tax Commissioner

STATE OF CONNECTICUT

TAX DEPARTMENT

92 FARMINGTON AVENUE • HARTFORD, CONNECTICUT 06115 February 2, 1972

> In reply refer to: Cigarette Tax Unit

Insurance Company of North America 566 Whalley Avenue New Haven, Connecticut 06511

RE: INA Claim-Credit Bond for \$100,000.

Gelb Bros. & Zuckerman, Inc.

14 Beckley Avenue

Stamford, Connecticut 06901

Your File #928B 230138

Attention: Ronald W. Stewart, Supervisor

Dear Sir:

We are in receipt of your draft in the amount of (82,803.22, in full payment of all claims, for the purchase of Cigarette Tax impressions and/or stamps, made by the State of Connecticut,

The above claim was covered by Insurance Company of North America, Bond #M591940.

Very truly yours,

MATTHEW F. O'SULLIVAN, DIRECTOR Collections and Accounting Division.

Arnold Goodman, Chief Tax Examiner Registration Section

AG/ash

STATE OF NEW YOU DEPARTMENT OF TAXATION AND FILL CE

BENTAPA L. SENULWI

COMMISSION MISCELLANEOUS TAX BUREAU STATE CAMPUS ALBANY, N.Y. 12227

DA: MISS EINTER 157-363;

December 30, 1971

Insurance Company of North America New Haven, Connecticut 06511 556 Whalley Avenue

Attn: Ronald W. Stewart, Supervisor

Re: Your file #9283230396
State of New York
Gelb Brothers & Zuckerman
D/E 6/2/71
New York State Clarette Credit
Bond #651900
Amount: \$15,000 Die: See See Stanford, Connecticut

and your check #KE2432501 dated December 27, 271 in the amount of \$8,987.60 in full payment of our class ander the cigarette credit bond described in the above ca ton. Your prompt cooperation in this latter is any ated.

, Bertram L. Schulzen "

JK:alb: cc: Mr. Elmer W. Beasley 880 Asylum Ave. Eartford, Conn. 06105 Re: INA v. James J. and Edward J. Jowdy d/b/a Gelb Bros. & Zuckerman - Connecticut Transcript of time ledger.

1971

- 11-12 Long telephone conference with Mr. Stewart who reported what information he had about principal and the State's claim. Called Mr. Newcomb to ascertain whether he had a letter written to agent by Sachs, Sachs & Sachs, attorneys re sale of principal's business. Prepared file and dictated a memorandum of all facts learned to date.
- 11-15 Called Mrs. Hart of Tax Collector's office and got all information contained in her file. Called Sachs, Sachs & Sachs, but person handling case on another wire. Left word for him to call me back. Put in call to Mr. Newcomb, and was advised no letter from O'Brien, and he has not returned calls. Put in second call to Sachs, but was told he had people with him, and again left word for him to call me. Two telephone conferences with Mr. Stewart. Third call from Mr. Stewart, and I dictated letter over the phone to indemnitors, to principal and to State.
- Telephone conference with Mr. Newcomb re notice to creditors.

 Received and reviewed notice to creditors. Telephone conference with Mr. Stewart. Asked him to try to obtain copies of agreement of sale and schedule of creditors. Telephone conference with Mrs. Hart of Tax Commissioner's Office. In law library researching Bulk Transfer Act, the cigarette tax statute, the collection procedure available to the Tax Commission, and the preference accorded State taxes. Another telephone conference with Mr. Stewart.
- 11-17 Reviewed notes of developments; long telephone conference with Mr. Newcomb to obtain information re tax bond to State of New York; to obtain 6 copies of each indemnity agreement; personal information about indemnitors, and other information re possible recovery against indemnitor. Telephone conference with Mr. Stewart; telephone conferences with Miss Blythe to straighten out coverage; telephone conference with Mrs. Hart of Tax Commissioner's Office.
- Telephone call to Mr. O'Sullivan of Tax Commissioner's Office re tax claim; telephone conferences (2) with Asst. Atty. Gen. Dunham re issuance of tax warrant. Two telephone conferences with Mr. Samuel Karin of the tax commissioner's office. He advised that Tax Commissioner had formally asserted State's claim for taxes in amount of \$99, 391.99. Several telephone conferences with Mr. Stewart on case to piece information together.

11-22-71 Drafted letter to Sachs, Sachs & Sachs to assert INA's claim to preference to purchase money. Went to Milford with Mr. Stewart to attend closing of sale, drafted assignment of purchase money to INA, had it executed by Gelb Bros., etc. and served it on Coclin's attorneys.

Put file together; reviewed financial reports. Called Mr. Newcomb to have him get Dun & Bradstreet reports on Jowdy corporations whose names I gave him. Long letter to State Tax Commission. Letter to Mr. Stewart.

11-24 Two telephone conversations with Mr. Stewart re closing of sale, and INA's position.

11-26 Arnold Goodman of Tax Commissioner's Office called to discuss contents of my letter and to tell me that audit would be completed early next week, and he discussed case generally.

- Call from Mr. Stewart to report that sale has not been consummated yet and may not be closed until next Monday, if then; that inventory still in controversy; that other claims have come in which were not listed; and that INA stands to get very little out of proceeds of sale. Also reported that Retail Credit reports show that the Jowdys do not own their homes in their own names, etc.
- 11-30 Telephone call to Mr. Newcomb to find out whether he had earlier financial statements from the Jowdys. He has them and is sending a set to me and one to Mr. Stewart. Letter to Mr. Stewart.
- 12-05 Studying and analyzing credit reports on the Jowdys and their various corporations; especially records of real estate holdings.
- 12-06 Telephone conversation with Attorney Sachs re progress of sale, and additional claims of creditors.
- 12-07 Worked on analysis of the Jowdy's real estate holdings as reported by Retail Credit Co.
- 12-08 Worked on analysis of Jowdy real estate transactions.
- 12-09 Completed analysis of real estate held in the names of the Jowdys and their corporations to separate the owners, and facilitate further search for information by Retail Credit Co. Long letter to Mr. Stewart with detailed outline of further investigation desired.
- 12-13 Telephone call from Mrs. Hart of the Tax Commissioner's Office to report developments on final audit still waiting for three more credits.
- 12-20 Letter to Mr. Sachs re claim of INA to proceeds of sale to Coclin.
- 12-30 call to Mr. Stewart not in, left word. Call from Mr. Stewart to report on latest developments from that end. I told him of receipt of audit from State.

- 1-03-72 Audited State of Conn. claim and all supporting papers. Letter to State Tax Commissioner. Letter to Mr. Stewart.
- 1-05 Working on latest Retail Credit reports of the Jowdy real estate holdings in an effort to see whether they have anything we can attach.
- 1-11 Letter to Mr. Stewart on his failure to get his letters to Jowdys delivered because Jowdys refused to accept them.
- 1-20 Telephone call from Mr. Newcomb re financial responsibility of indemnitors; review of Connecticut tax audit to answer Mr. Stewart's inquiry.
- 1-21 Further review of file; call to Mr. Newcomb to verify fact we had bond for previous period; letter of explanation to Mr. Stewart, and to suggest early payment of claim.
- 1-21 Analysis and abstracting of Retail Credit reports of real estate ownership by Jowdys and the encumbrances thereon to determine what we can get by attachment of real estate.
- 1-23 Continued work on analysis of title to real estate owned by the Jowdys and their corporations, and the encumbrances thereon to determine what equities they may have at this time; started dictation of abstracts to give this information as to each piece of property and a legal description for purposes of attachment.
- 1-24 Finished dictating abstracts of titles and encumbrances; tabulated total values of all pieces of property; and total amount of all encumbrances to arrive at the approximate equities in the properties; telephone call from Mrs. Hart of the Tax Commissioner's Office; two letters to Mr. Stewart.
- 1-27 Telephone conference with Mr. Stewart re payment of State of Conn. tax claim.
- 1-31 Mr. Stewart called to tell me Edward Jowdy had been in touch with him by telephone, and that he agreed the State's claim appeared to be correct; that Edward had an appointment in Hartford on Thursday of this week, and wanted to stop in Stewart's office on the way back to discuss arrangements for payment of the debt to INA.
- 2-01 Mrs. Hart of Tax Commissioner's Office called to inquire when she would be receiving a check, and we discussed case at some length.
- 2-04 Telephone conference with Mr. Stewart in which he reported results of his meeting with Ed. Jowdy on Thursday, and his telephone conversations with Mr. Coclin.
- 2.07 Mr. Newcomb called to discuss case; said he was in Danbury over the weekend and talked to an attorney by the name of Norman A. Buzaid who claims to know Jowdys very well. Mr. Newcomb suggested I might want to use him for investigation, etc.

- 3-24-72 Reviewed all files; computed the claims; computed interest, and wrote Mr. Stewart an analysis.
- 5-01 Reviewed Mr. Stewart's letter of April 13 and wrote letter to Kalman Sachs re remitting INA's share of sale to me.
- 5-19 Letter from Mr. Stewart. Review of file and letter to Mr. Stewart.
- 6-20 Letter from Mr. Stewart. Letter to Mr. Stewart.
- 9=28 Letter from Mr. Stewart. Letter to Mr. Stewart.
- 10-27 Call from Kalman Sachs saying he had \$38, 255.60 from the sale. He is meeting with the Jowdys this afternoon to see what he can work out and will be in touch with me later.
- 10-28 Letter to Mr. Stewart to report on my conversation with Kalman Sachs on Friday, Oct. 27.
- 11-06 Call to Mr. Sachs to get report on meeting with Jowdys. Call to Mr. Stewart to report to him, and discussed procedure to recover our loss.
- 11-24 Received letter from Mr. Stewart inquiring into developments re collection. Letter to Mr. Stewart to bring up to date.
- 1-31-73 Received letter from Mr. Stewart. Reviewed file and wrote letter to Mr. Sachs to ask for report on developments.
- 3-30 Letter to Mr. Stewart and long letter to Mr. Edward Jowdy.
- 5-02 Telephone call from a Mr. Levin of Bridgeport telling me he is becoming distributor of the funds, and we should get \$18,000 before much longer, and letter to Mr. Stewart.

Re: Gelb Bros. & Zuckerman, Inc. v. State of New York Transcript of time ledger.

- 11-17-71 Long telephone conference with Mr. Newcomb to obtain information re tax bond to State of New York and to obtain 6 copies of each indemnity agreement. Telephone conversations with Mr. Stewart and Miss Blythe to straighten out coverage. Telephone conversation with Mrs. Hart of Tax Commissioner's Office.
- Drafted letter to Coclin's attorneys to assert State of New York's preferred claim to purchase money. Reviewed State of New York claim against INA. Went to Milford with Mr. Stewart to attend closing of sale. Asserted INA's superior claim to purchase moneys; found other creditors had attachedk, or obtained promises of Coclin's attorneys to pay claims in lieu of attachment. Drafted assignment of all moneys above \$18,000 to INA; had it executed by Gelb Bros. & Zuckerman, and served on Coclin's attorney who acknowledged its receipt in writing.
- Put file together. Reviewed financial reports. Called Mr.
 Newcomb and gave him names of Jowdy corporations, and asked
 him to get prompt Dun & Bradstreet reports on them, and call
 agent and get identity of shopping centers Jowdys may own.
 Long letter to State of New York. Letter to Mr. Stewart.
- 11-29 Call from Mr. Stewart to report on the status of this case.
- 11-30 Telephone call to Mr. Newcomb to find out whether he had earlier financial statements from the Jowdys. He has and is sending a set to me and one to Mr. Stewart. Letter to Mr. Stewart.
- 12-13 Wrote letter to State of New York Tax Commission. Letter to Mr. Stewart re payment of tax due.
- 12-20 Conference with Mr. Stewart re payment of N. Y. State claim, and gave instructions for payment.
- 1-21-72 Analysis and abstracting of Retail Credit reports of real estate owned by Jowdys and the encumbrances thereon to determine what we can get by attachment of real estate.
- 1-23 Continued word on analysis of titles to real estate owned by the Jowdys and their corporations, and the encumbrances thereon to determine what equities they may have at this time; started dictation of abstracts to give this information as to each piece of property and a legal description for purposes of attachment.
- 1-24 Finished dictating abstracts of titles and encumbrances; tabulated total values of all pieces of property; and total amount of all encumbrances to arrive at the approximate equities in the properties. Telephone call from Mrs. Hart of the Tax Commissioner's Office; two letters to Mr. Stewart.

- 1-28-72 Reviewed bond files running to State of N.Y. to determine which bond covered latest claim by N.Y. State Commission. Letter to Mr. Stewart advising him of the correct bond involved, and suggesting prompt payment.
- 3-02 Long telephone conference with Mr. Stewart re coverage.
- 3-24 Wrote Mr. Stewart an analysis of the claims with interest, and the means of repayment of the loss and expenses with instructions.
- 5-19 Letter from Mr. Stewart. Review of file. Letter to Mr. Stewart.
- 6-20 Letter from Mr. Stewart. Letter to Mr. Stewart.
- 11-24 Received letter from Mr. Stewart inquiring into developments re collection. Letter to Mr. Stewart to bring him up to date.
- 1-31-73 Received letter from Mr. Stewart. Reviewed files and wrote letter to Mr. Sachs to ask for report on developments.
- 3-30 Letter to Mr. Stewart and long letter to Edward Jowdy.
- 5-02 Telephone call from a Mr. Levin of Bridgeport telling me he is becoming distributor of the funds and we should get \$18,000 before much longer, and letter to Mr. Stewart.

Re: INA v. James J. and Edward J. Jowdy d/b/a Gelb Bros. & Zuckerman-Connecticut Expenses incurred for INA's account.

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Exhibit F

Re: Gelb Bros. & Zuckerman v. State of New York Expenses incurred for INA's account

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

INSURANCE COMPANY OF NORTH AMERICA,) Plaintiff,)	
VS.	CIVIL ACTION FILE NO. H 124
GELB BROS. & ZUCKERMAN, INC.,	
JAMES J. JOWDY, JACQUELINE JOWDY,	
EDWARD J. JOWDY, and JOAN JOWDY,	
Defendants.)	

SUPPLEMENTAL AFFIDAVIT SUPPORTING MOTION FOR SUMMARY JUDGMENT.

STATE OF CONNECTICUT)
COUNTY OF HARTFORD) ss

Joseph A. Newcomb, being first duly sworn, on oath, deposes and says:

- 1. I am assistant manager of the Bond Underwriting Department in the Hartford Service Office of Insurance Company of North America, plaintiff in the above entitled action: which service office has underwriting jurisdiction of all business, including bonds, written by plaintiff in nearly all cities and towns of Connecticut, including the City of Danbury; and I am responsible for underwriting all fidelity and surety bonds which originate within the territory of the Hartford Service Office.
- 2. I personally handled or supervised the underwriting of all tax credit bonds written by plaintiff for James J. Jowdy and Edward J. Jowdy, a partnership, doing business as Gelb Bros. & Zuckerman, and

for Gelb Bros. & Zuckerman, Inc., and running to the tax commissioner of the State of Connecticut and the New York State Tax Commission; I have personal knowledge of the facts hereinafter stated; and I am authorized to make this affidavit in plaintiff's behalf.

Underwriting Background.

- 3. In April, 1969, James J. Jowdy and Edward J. Jowdy formed an equal partnership, and purchased the stock, fixtures, trade name, and good will of Irving Fisher, doing business as Gelb Bros. & Zuckerman, a licensed wholesale distributor of cigarettes, who maintained a place of business at 14 Beckley Avenue, Stamford, Connecticut.
- 4. Connecticut General Statutes, ch. 14, §§ 12-285 12-330, provides for the licensing of cigarette distributors and the taxes on cigarettes held for sale in Connecticut. C.G.S.A., § 12-286 requires each distributor of cigarettes to secure a license from the tax commissioner before engaging in business.
 - 5. C.G.S.A., § 12-288, provides in pertinent part as follows:

"Each distributor's license issued under the provisions of section 12-286 shall be valid for a period beginning with the date of license to the thirtieth day of September next succeeding the date of license unless sooner revoked by the commissioner as provided in section 12-295 or unless the person to whom such license was issued discontinues business in either of which cases the holder of the license shall immediately return it to the tax commissioner."

6. Upon their purchase of the business from Fisher, James J. Jowdy and Edward J. Jowdy, a partnership, doing business as Gelb

Bros. & Zuckerman, obtained from the tax commissioner a license to engage in business as a cigarette distributor at 14 Beckley Avenue, Stamford, Connecticut, which license expired on September 30, 1969; and they secured a similar license from the tax commissioner for the period beginning October 1, 1969, and ending on September 30, 1970.

7. C.G.S.A., § 12-298, provides in pertinent part as follows:

"The tax commissioner shall secure stamps *** suitable to be affixed to packages of cigarettes as evidence of the payment of the tax imposed by this chapter. He shall sell such stamps

(a) to licensed distributors to be affixed to packages of cigarettes to be sold ***.

* * * * *

"The commissioner may, in his discretion, permit a licensed distributor *** to pay for such stamps within thirty days after the date of purchase, provided a bond satisfactory to the commissioner in an amount not less than the sale price of such stamps shall have been filed with the commissioner conditioned upon payment for such stamps."

8. The tax commissioner requires a licensed distributor who desires to purchase cigarette stamps on credit to file an annual tax credit bond to cover the period commencing July 1 and ending the followaing June 30 to coincide with the State's fiscal year which begins July 1, and ends the following June 30. The tax commissioner has prescribed the official form of bond to be filed in such case, which is designated as Form Adm-16.

Jowdys Ask Plaintiff To Write Tax Credit Bonds Upon Their Personal Indemnity.

- 9. James J. Jowdy and Edward J. Jowdy, copartners, doing business as Gelb Bros. & Zuckerman, applied to plaintiff for the tax credit bond which they were required to file with the tax commissioner, in the penal sum of \$100,000, for the period commencing July 1, 1969, and ending June 30, 1970; and, in consideration of plaintiff agreeing to become surety on their tax credit bond, and as a condition precedent to plaintiff agreeing to become surety on said bond, James J. Jowdy and Edward J. Jowdy, with their respective wives, orally promised to execute and deliver to plaintiff written indemnity agreements, wherein they would agree to indemnify plaintiff against all loss, cost, and expense it should sustain or incur by reason of becoming surety on said bond.
- 10. In keeping with their oral promise, James J. Jowdy and Jacqueline Jowdy did execute and deliver to plaintiff their joint and several indemnity agreement, dated July 1, 1969; a duplicated copy of which indemnity agreement is attached hereto, incorporated herein by reference, and made a part hereof, to the same extent as if it were fully set forth herein, as Exhibit A.
- 11. In keeping with their oral promise, Edward J. Jowdy and Joan Jowdy did execute and deliver to plaintiff their joint and several indemnity agreement, dated July 1, 1969; a duplicated copy of which indemnity agreement is attached hereto, incorporated herein by

reference; and made a part hereof, to the same extent as if it were fully set forth herein, as Exhibit B.

- 12. In reliance upon their oral promises, followed by he two indemnity agreements executed and delivered to plaintiff by James J.

 Jowdy, Jacqueline Jowdy, Edward J. Jowdy, and Joan Jowdy, plaintiff did become surety on their tax credit bond, which named James J.

 Jowdy and Edward J. Jowdy, copartners, doing business as Gelb

 Bros. & Zuckerman, as Principal, and plaintiff, as Surety, in the penal sum of \$100,000, which was filed with the tax commissioner, and which covered the period from July 1, 1969, to June 30, 1970.
- 13. James J. Jowdy and Edward J. Jowdy, copartners, doing business as Gelb Bros. & Zuckerman, did not breach the conditions of their tax credit bond during the period commencing July 1, 1969, and ending June 30, 1970, and no claim was made by the tax commissioner on that bond.
- 14. As an inducement to plaintiff to become surety on their tax credit bond for the period commencing July 1, 1970, and ending June 30, 1971, James J. Jowdy and Jacqueline Jowdy submitted to plaintiff a statement of their financial condition as of March 31, 1970, prepared by O'Byrne, Aldrich & Hubb, certified public accountants, of Danbury, Connecticut, and Edward J. Jowdy and Joan Jowdy also submitted to plaintiff a statement of their financial condition as of March 31, 1970, prepared by the same certified public accountants.

Duplicated copies of those financial statements are attached hereto, incorporated herein by reference, and made a part hereof, to the same extent as if they were fully set forth herein, as Exhibits C and D, respectively.

15. During the negotiations for the new tax credit bond which continued during May and June, 1970, James J. Jowdy and Edward J. Jowdy each, with their respective wives, orally promised and agreed to indemnify plaintiff under written indemnity agreements, the same as they had done in the case of the 1969 credit bond, if plaintiff would become surety on the new tax credit bond required for the period commencing July 1, 1970, and ending June 30, 1971.

The Jowdys Incorporate Gelb Bros. & Zuckerman, Inc.

- 16. On June 22, 1970, James J. Jowdy and Edward J. Jowdy incorporated Gelb Bros. & Zuckerman, Inc. under the laws of the State of Connecticut, to engage in the business of a wholesale cigarette distributor, with an authorized capital of \$150,000, consisting of 150 shares of \$1,000 par value stock, and a paid in capital of \$1,000; all 150 shares of stock being issued; James J. Jowdy was president, Taily Jowdy, another brother, was vice president, and Edward J. Jowdy was secretary and treasurer; and the board of directors consisted of the three officers.
- 17. I had no knowledge that James J. Jowdy and Edward J. Jowdy intended to cause Gelb Bros. & Zuckerman, to be incorporated until after it was an accomplished fact. The Jowdys old me that the license

issued to them, as copartners, doing business as Gelb Bros. & Zucker-man, would be surrendered to the tax commissioner on July 1, 1970, and they would obtain a license in the name of their corporation, and a permit to purchase cigarette stamps on credit, both to be effective July 1, 1970; and that their corporation would assume the business of the partnership on July 1, 1970.

Jowdys Request Plaintiff To Write 1970 Bond Naming Their Corporation As Principal On Their Indemnity.

- 18. After James J. Jowdy and Edward J. Jowdy caused Gelb Bros. & Zuckerman to be incorporated, they requested plaintiff to become surety on the cigarette credit bond which their corporation was required to file with the tax commissioner for the period commencing July 1, 1970, and ending June 30, 1971; and, in consideration of plaintiff agreeing to become surety on their bond, naming Gelb as principal, and as a condition precedent to plaintiff agreeing to write the bond, James J. Jowdy and Edward J. Jowdy, with their respective wives, orally promised and agreed to indemnify plaintiff and to execute and deliver to plaintiff written indemnity agreements, naming Gelb, as principal therein, the same as they had done in the case of the 1969 credit bond which plaintiff had executed for their partnership.
- 19. In reliance upon the oral promises and agreements of James J. Jowdy, Jacqueline Jowdy, Edward J. Jowdy, and Joan Jowdy to indemnify plaintiff, and to execute and deliver to plaintiff written

indemnity agreements, naming Gelb, their wholly owned corporation, as principal, the tax credit bond, naming Gelb as principal, and plaintiff, as surety, in the penal sum of \$100,000, dated June 26, 1970, was signed and sealed by the principal and surety in plaintiff's Hartford Service Office on June 26, 1970. A duplicated copy of the bond is annexed hereto and made a part hereof, as Exhibit E.

- 20. At the time when the bond was signed, in addition to the oral promises to indemnify plaintiff, the two indemnity agreements, dated July 1, 1969 (Exhibits A and B), were still in full force and effect, and have never been cancelled to this date; the only difference between those indemnity agreements and the July 1, 1970 indemnity agreements is to name the Jowdys' corporation as principal instead of their partnership; but the same entity, the same business, the same kind of permit, and the same persons are involved in both instances.
- 21. In compliance with their oral promises and agreements,
 James J. Jowdy and Jacqueline Jowdy did execute and deliver to plaintiff their joint and several indemnity agreement, under seal, which was
 dated July 1, 1970. A duplicated copy of that indemnity agreement is
 attached to the complaint as Exhibit C, and to the supporting affidavit
 of Ronald W. Stewart, on file in this action, as Exhibit A; reference
 to which is hereby expressly made, and it is incorporated herein by
 this reference, and made a part hereof, to the same extent as if it
 were fully set forth herein.

- 22. In compliance with their oral promise and agreement, Edward J. Jowdy and Joan Jowdy did execute and deliver to plaintiff their joint and several indemnity agreement, under seal, and dated July 1, 1970. A duplicated copy of that agreement is annexed to the complaint as Exhibit D, and to the supporting affidavit of Ronald W. Stewart, on file in this action, as Exhibit B; reference to which is hereby expressly made, and it is incorporated herein by this reference, and made a part hereof, to the same extent as if it were fully set forth herein.
- 23. The bond (Exhibit E annexed hereto) recites on its face that is is for a period commencing the first day of July, 1970, and ending the thirtieth day of June, 1971. The permit to purchase cigarette stamps on credit, which was secured by the bond, was issued to Gelb, the corporation, on or about July 1, 1970, but in any event it was effective on July 1, 1970.
- 24. All of the documents annexed hereto as exhibits are true and correct duplicated copies of the original documents which appear in plaintiff's files and, in the case of the bond, on file in the tax commissioner's office.

Deponent

STATE OF CONNECTICUT) ss

Subscribed and sworn to before me, this thirty-first day of January, 1974.

Commissioner of Superior Court

, 19 69 , by and between

INSURANCE COMPANY OF NORTH AMERICA

PHILADELPHIA, PA.

INDEMNITY AGREEMENT

For all types of bonds other than Contract.

THIS AGREEMENT, made this ______day of ___July ____

Jenes J. Jordy
(full name of Indemnitor)
Jacqueline Josdy
(hereinafter called the Indemnitor) and INSURANCE COMPANY OF NORTH AMERICA, a Pennsylvan corporation with its head office at 1600 Arch Street, Philadelphia, (hereinafter called the Companwitnesseth: WHEREAS the Company may from time to time hereafter execute bond(s), under kings a obligations of suretyship or guarantee (all hereinafter called bond(s)) on behalf of
James J. Mondy and Edward J. Joudy, a partnership, doing business as
CELS EROS. & ZUCKLENAN
of (P. O. Address) 14 Deciler Avenue, Stanford, Connection: 06901
(hereinafter called the Principal); and
WHEREAS the Indemnetor is financially or otherwise interested in the affairs of the Principal and therefore, interested in enabling the Principal to procure the prompt and ready execution of such bond (by the Company; and
WHEREAS to accomplish such purpose the Indemnitor is willing to execute this continuing agreement of indemnity (until revoked as hereinafter set forth) which shall have the same force and effect if the Indemnitor had executed a separate indemnity agreement, in all respects similarly conditioned, connection with each such bond executed by the Company for the Principal:
NOW, THEREFORE, in consideration of the premises and the sum of One Dollar in hand paid the Company to the Indemnitor, receipt whereof is hereby acknowledged, the Indemnitor hereby agree for himself or itself and his or its heirs, executors, administrators, successors and assigns as follows. 1. That all the terms appendices and discountered to the company of the
1. That all the terms, provision conditions and agreements herein contained shall be binding as obligatory upon the Indemnitor with respect to any such bond(s) hereafter executed by the Company f the Principal, which bond(s) shall be deemed to have been executed by the Company at the request each instance of the Principal and the Indemnitor.
2. That the Indemnitor will pay or cause to be paid to the Company upon the execution of each such bond a premium computed at the applicable schedule of rates published by the Company and effect on the date such bond becomes effective and to pay or cause to be paid in advance all subsequent annual or other premiums at said rates until all liability under each such bond shall have terminated and the Company shall have received satisfactory evidence of such termination.
3. That the Indemnitor will perform all the obligations of any such bond(s) and will at all time indemnify and keep indemnified the Company from and against every claim, demand, loss, liability, cost charge, attorneys' fee, expense, suit, order, judgment or adjudication that the Company shall or may fee any cause at any time sustain, incur or become subject to by reason of executing any such bond(s).
4. That the Indemnitor's liability hereunder shall, without however limiting the indemnity provide in the preceding paragraph, extend to and include all costs, expenses and attorneys' fees incurred constained by the Company in making any investigation on account of any such bond(s), in prosecution

or defending any action brought in connection therewith, in obtaining or seeking to obtain a release

therefrom and in enforcing any of the agreements herein contained.

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- -. 5. That the use by the Company of a renewal certificate or other instrument for the purpose of extending the term of any such bond(s) shall impose liability upon the Indemnitor hereunder as if the bond(s) continued in effect as extended by its terms.
- 6. That the Company is hereby authorized, but not required, to make or consent to any change of any kind whatsoever in any such bond(s) whether given in connection with a contract or otherwise, without notice to or consent by the Indemnitor.
- 7. That in any action brought against the Principal alone, the outcome of which might affect the liability of the Company or in any action in which both Principal and Company are parties, notwith-standing the fact that the Principal may have engaged counsel to represent him or it and the Company, or either of them, the Company shall have the right to retain its own counsel if in its sole opinion the protection of its interests require it to do so, and all costs, expenses and attorneys' fees incurred or sustained thereby shall be a liability of the Indemnitor hereunder.
- 8. That in the event of payment, settlement or compromise in good faith of any claim, demand, loss, liability, cost, charge, attorneys' fee, expense, suit, order, judgment or adjudication in connection with any such bond(s), an itemized statement thereof sworn to by an officer or officers of the Company or the voucher or vouchers or other evidence of such payment, settlement or compromise shall be prima facie evidence of the fact and extent of the liability of the Principal; and the Company shall have the right in good faith to pay, settle or compromise, or litigate any such claim, demand, loss, liability, cost, charge, attorneys' fee, expense, suit, order, judgment or adjudication under the belief that it is liable therefor, whether liable or not, without the consent or approval of the Indemnitor unless the Indemnitor shall protest in writing and shall simultaneously with such protest deposit with the Company collateral satisfactory to it sufficient to pay and satisfy such claim, demand, loss, liability, cost, charge, attorneys' fee, expense, suit, order, judgment or adjudication and any judgment or judgments as may result with interest, costs, expenses and attorneys' fee.
- 9. That in the event the Company is required to reserve from its assets an amount to cover any claim, demand, liability, expense, suit, order, judgment or adjudication under any such bond(s) by reason of the breach or default of the bond(s) related thereto, the Indemnitor hereby covenants and agrees immediately on demand to deposit with the Company in current funds an amount equal to such reserve as collateral security to be held by the Company for its indemnification without derogation of any other rights to indemnity afforded by this instrument, and if the Company is required to enforce performance of this covenant by action at law or in equity, the costs, charges and expenses, including attorneys' fees, which it may incur shall be included in such action and paid by the Indemnitor.
- 10. That the Indemnitor shall waive and does hereby waive, so far as liability under this indemnity agreement is concerned, all rights to claim any property, including homesteads, as exempt from levy, execution, sale or other legal process under the law of any state or states.
- 11. That in the event the Company executes any such bond(s) with cosurety or cosureties or reinsures all or any part of such bond(s), all the terms and provisions of this agreement shall apply and operate for the benefit of such cosureties and such reinsurers as their interests may appear.
- 12. That separate suits may be brought hereunder as causes of action accrue, and the bringing of suit or the recovery of judgment upon any cause of action shall not prejudice or bar the bringing of other suits upon other causes of action whether theretofore or thereafter arising.
- 13. That the Indemnitor hereby waives notice of the execution of any such bond(s) and of any and all matters affecting the liability of the Company under any such bond(s).
- 14. That in case any person expected to sign this agreement of indemnity or any of the parties mentioned herein fails to execute the same, or in case the execution hereof by any of the parties be defective or invalid for any reason, such failure, defect or invalidity shall not in any manner affect the validity of this agreement of indemnity or the liability hereunder of any of the parties executing the same, but each and every party so executing shall be and remain fully bound and liable hereunder to the same extent as if such failure, defect or invalidity had not existed.
- 15. That the failure of the Company to insist upon strict compliance with any of the terms hereof shall not be considered to be a waiver of any of such terms nor shall it militate against the right of the Company to insist upon strict compliance herewith at any time thereafter whether in connection with the same or any other bond(s) executed in reliance hereon.

- 16. That this agreement shall remain in full force and effect until ten days after receipt by the Company of written notice by registered mail addressed to the Bonding Department of the Company at its head office at 1600 Arch Street, Philadelphia, Pennsylvania, revoking this agreement of indemnity, the Indemnitor to have no liability under this agreement with respect to bond(s) executed by the Company for the Principal after the effective date of such notice but to remain bound under this agreement with respect to bond(s) executed prior to the effective date of such notice.
- 17. That the taking by the Company from the Indemnitor of a specific indemnity agreement or agreements in connection with a bond executed for the Principal shall in no way affect the operation of this general indemnity agreement whether as to bonds theretofore or thereafter executed for the Principal.
- 18. That if this agreement shall be signed by two or more Indemnitors, the word "Indemnitor," whenever it appears herein, shall be considered to read "Indemnitors," and any grammatical changes in the accompanying text necessitated by such pluralizing of the word "Indemnitor" shall be considered to have been made. When two or more Indemnitors sign this agreement they shall both or all be bound hereunder jointly and severally. The termination of this agreement as to any one of two or more Indemnitors shall not relieve the others unless they shall join in the notice of termination.
- 19. That if any provision of this agreement shall be contrary to the laws of any state in which the same shall be sought to be enforced, the illegality or unenforceability of any such provision shall not affect the other terms, covenants and conditions hereof, and the same shall be binding upon the Indemnitor with the same force and effect as though such illegal or unenforceable provision were not contained herein.

20.

SIGNED, SEALED	and DAT	ED this 1st	day of	July	, ₁₉ <u>69</u> .
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P. O. Address		Attest or Witness	J.J. P. O. Addre		tole Theang
P. O. Address		Attest or Witness	P. O. Addre		Indemnitor
			. P. O. Addre	255	

STATE OF Connecticin	
COUNTY OF Fairfield	ss.:
On this 1st day of	Jul

...

James J. Joudy,	Jacqueline Jowdy
nstrument, and he thereupon acknowledge	e person described in and who executed the foregoinged to me that he executed the same.
	Mildred L. Cree
TATE OF	Notary Public
OUNTY OF ss.:	
On thisday of	, 19:, before me personally appeared
•	<u> </u>
me known, who being by me duly sworn	, did depose and say: that he resides in the
e corporation described in and which en al of said corporation; that the seal affi as affixed by order of the Board of Direct	xecuted the foregoing instrument; that he knows the ixed to said instrument is such corporate seal; that it ctors of said corporation, and that he signed his name
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INSURANCE COMPANY OF NORTH AMERICA

PHILADELPHIA, PA.

INDEMNITY AGREEMENT

For all types of bonds other than Contract.	
. THIS AGREEMENT; made this . lst day of, 19	
Edward J. Jovdy (full name of Indemnitor)	
Jean Jowdy	
	•
reporation with its head office at 1600 Arch Street, Philadelphia, (hereinafter ditnesseth: WHEREAS the Company may from time to time hereafter execute bond(s) bligations of suretyship or guarantee (all hereinafter called bond(s)) on behalf of James J. Joudy and Edward J. Joudy, a partnership, doing business.	s), undertakings and f
(P. O. Address) 14 Bookley Avanua, Stanford, Connections 06901	

WHEREAS the Indemnitor is financially or otherwise interested in the affairs of the Principal and is, therefore, interested in enabling the Principal to procure the prompt and ready execution of such bond(s) by the Company; and

WHEREAS to accomplish such purpose the Indemnitor is willing to execute this continuing agreement of indemnity (until revoked as hereinafter set forth) which shall have the same force and effect as if the Indemnitor had executed a separate indemnity agreement, in all respects similarly conditioned, in connection with each such bond executed by the Company for the Principal:

NOW, THEREFORE, in consideration of the premises and the sum of One Dollar in hand paid by the Company to the Indemnitor, receipt whereof is hereby acknowledged, the Indemnitor hereby agrees for himself or itself and his or its heirs, executors, administrators, successors and assigns as follows:

- 1. That all the terms, provisions, conditions and agreements herein contained shall be binding and obligatory upon the Indemnitor with respect to any such bond(s) hereafter executed by the Company for the Principal, which bond(s) shall be deemed to have been executed by the Company at the request in each instance of the Principal and the Indemnitor.
- 2. That the Indemnitor will pay or cause to be paid to the Company upon the execution of each such bond a premium computed at the applicable schedule of rates published by the Company and in effect on the date such bond becomes effective and to pay or cause to be paid in advance all subsequent, annual or other premiums at said rates until all liability under each such bond shall have terminated and the Company shall have received satisfactory evidence of such termination.
- 3. That the Indemnitor will perform all the obligations of any such bond(s) and will at all times indemnify and keep indemnified the Company from and against every claim, demand, loss, liability, cost, charge, attorneys' fee, expense, suit, order, judgment or adjudication that the Company shall or may for any cause at any time sustain, incur or become subject to by reason of executing any such bond(s).
- 4. That the Indemnitor's liability hereunder shall, without however limiting the indemnity provided in the preceding paragraph, extend to and include all costs, expenses and attorneys' fees incurred or sustained by the Company in making any investigation on account of any such bond(s), in prosecuting or defending any action brought in connection therewith, in obtaining or seeking to obtain a release therefrom and in enforcing any of the agreements herein contained.

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- 5. That the use by the Company of a renewal certificate or other instrument for the purpose of extending the term of any such bond(s) shall impose liability upon the Indemnitor hereunder as if the bond(s) continued in effect as extended by its terms.
- 6. That the Company is hereby authorized, but not required, to make or consent to any change of any kind whatsoever in any such bond(s) whether given in connection with a contract or otherwise, without notice to or consent by the Indemnitor.
- 7. That in any action brought against the Principal alone, the outcome of which might affect the liability of the Company or in any action in which both Principal and Company are parties, notwith-standing the fact that the Principal may have engaged counsel to represent him or it and the Company, or either of them, the Company shall have the right to retain its own counsel if in its sole opinion the protection of its interests require it to do so, and all costs, expenses and attorneys' fees incurred or sustained thereby shall be a liability of the Indemnitor hereunder.
- 8. That in the event of payment, settlement or compromise in good faith of any claim, demand, loss, liability, cost, charge, attorneys' fee, expense, suit, order, judgment or adjudication in connection with any such bond(s), an itemized statement thereof sworn to by an officer or officers of the Company or the voucher or vouchers or other evidence of such payment, settlement or compromise shall be prima facie evidence of the fact and extent of the liability of the Principal; and the Company shall have the right in good faith to pay, settle or compromise, or litigate any such claim, demand, loss, liability, cost, charge, attorneys' fee, expense, suit, order, judgment or adjudication under the belief that it is liable therefor, whether liable or not, without the consent or approval of the Indemnitor unless the Indemnitor shall protest in writing and shall simultaneously with such protest deposit with the Company collateral satisfactory to it sufficient to pay and satisfy such claim, demand, loss, liability, cost, charge, attorneys' fee, expense, suit, order, judgment or adjudication and any judgment or judgments as may result with interest, costs, expenses and attorneys' fee.
- 9. That in the event the Company is required to reserve from its assets an amount to cover any claim, demand, liability, expense, suit, order, judgment or adjudication under any such bond(s) by reason of the breach or default of the bond(s) related thereto, the Indemnitor hereby covenants and agrees mmediately on demand to deposit with the Company in current funds an amount equal to such reserve as collateral security to be held by the Company for its indemnification without derogation of any other eights to indemnity afforded by this instrument, and if the Company is required to enforce performance of this covenant by action at law or in equity, the costs, charges and expenses, including attorneys' fees, which it may incur shall be included in such action and paid by the Indemnitor.
- 10. That the Indemnitor shall waive and does hereby waive, so far as liability under this indemnity greement is concerned, all rights to claim any property, including homesteads, as exempt from levy, xecution, sale or other legal process under the law of any state or states.
- 11. That in the event the Company executes any such bond(s) with cosurety or cosureties or einsures all or any part of such bond(s), all the terms and provisions of this agreement shall apply and perate for the benefit of such cosurcties and such reinsurers as their interests may appear.
- 12. That separate suits may be brought hereunder as causes of action accrue, and the bringing of uit or the recovery of judgment upon any cause of action shall not prejudice or bar the bringing of ther suits upon other causes of action whether theretofore or thereafter arising.
- -13. That the Indemnitor hereby waives notice of the execution of any such bond(s) and of any nd all matters affecting the liability of the Company under any such bond(s).
- 14. That in case any person expected to sign this agreement of indemnity or any of the parties pentioned herein fails to execute the same, or in case the execution hereof by any of the parties be efective or invalid for any reason, such failure, defect or invalidity shall not in any manner affect the alidity of this agreement of indemnity or the liability hereunder of any of the parties executing the ame, but each and every party so executing shall be and remain fully bound and liable hereunder to be same extent as if such failure, defect or invalidity had not existed.
- 15. That the failure of the Company to insist upon strict compliance with any of the terms hereof nall not be considered to be a waiver of any of such terms nor shall it militate against the right of the company to insist upon strict compliance herewith at any time thereafter whether in connection with me same or any other bond(s) executed in reliance hereon.

- 16. That this agreement shall remain in full force and effect until ten days after receipt by the Company of written notice by registered mail addressed to the Bonding Department of the Company at its head office at 1600 Arch Street, Philadelphia, Pennsylvania, revoking this agreement of indemnity, the Indemnitor to have no liability under this agreement with respect to bond(s) executed by the Company for the Principal after the effective date of such notice but to remain bound under this agreement with respect to bond(s) executed prior to the effective date of such notice.
- 17. That the taking by the Company from the Indemnitor of a specific indemnity agreement or agreements in connection with a bond executed for the Principal shall in no way affect the operation of this general indemnity agreement whether as to bonds theretofore or thereafter executed for the Principal.
- 18. That if this agreement shall be signed by two or more Indemnitors, the word "Indemnitor," whenever it appears herein, shall be considered to read "Indemnitors," and any grammatical changes in the accompanying text necessitated by such pluralizing of the word "Indemnitor" shall be considered to have been made. When two or more Indemnitors sign this agreement they shall both or all be bound hereunder jointly and severally. The termination of this agreement as to any one of two or more Indemnitors shall not relieve the others unless they shall join in the notice of termination.
- 19. That if any provision of this agreement shall be contrary to the laws of any state in which the same shall be sought to be enforced, the illegality or unenforceability of any such provision shall not affect the other terms, covenants and conditions hereof, and the same shall be binding upon the Indemnitor with the same force and effect as though such illegal or unenforceable provision were not contained herein.

20.

SIGNED, SEALED and DATED this 1st	_day of, 19
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Vartey as	9 colley (Cent) Harling, Con
Lenger Tille	Chan Kendy
P. O. Address 776 66 Attest or Witness	P. O. Address Control
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P. O. Address	Indemnitor
r. U. Address	P. O. Address

· A · · - ·	
COUNTY OF Fairfield	
Ja. 1 1.18	SS.
COUNTY OF Jarfreld	

Edward J. Jowdy to me known and known to me to be th	e person described in and who executed the foregoing
nstrument, and he thereupon acknowledge	ged to me that he executed the same.
	Shilked L. Cree
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SOUNTY OF	
On thisday of	, 19, before me personally appeared
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Notary Public

O'BYRNE, ALDRICH & HUB CERTIFIED PUBLIC ACCOUNTANTS 30 WEST STREET DANBURY, CONN. 06810

NICHARD S. ALDRICH, C.P.A. NORMAN E. HUII, C.P.A. JOHN P. O'BYHNE, C.P.A.

(203) 743.0777 (203) 743.4022 (203) 426.2326

May 2, 1970

Mr. & Mrs. James Jowdy Overlook Terrace Danbury, Connecticut 06910

Dear Mr. & Mrs. Jowdy:

In accordance with your request we have prepared the attached Statement of Financial Condition as of March 31, 1970.

In our opinion the accompaning Statement of Financial Condition presents fairly your financial position as of March 31, 1970.

Respectfully submitted,

O'BYRTH, ALDRICH & HUB

yames & Jacqueline Jowdy Statement of Financial Condition March 31, 1970

Current Assets

Cash			4,144.00
Fixed Assets			
Residence at appraised fair market			
value		82,000.00	
Rental Property			
At appraised fair market value			
One Family House	44,000.00		
Two Family House	35,000.00	79,000.00	
Building Lot-City 1.3 acres			
. at appraised fair market value	• •	17,000.00	
Undivided 33 1/3% interest in			
residential land development	•		
at appraised fair market value		60,000.00	
Undivided 22% interest in commerci	ial		
shopping centers at appraised			
fair market value		100,000.00	the two sections
Undivided 33 1/3% interest in.		A STATE OF THE	
Warehouse Real Estate and Busine	ess		
at appraised fair market value		159,755.00	
Undivided 25% interest in Warehous	se		
. Business Book Value		25,200.00	
Undivided 50% interest in Wholesal	.e		
Tobacco Business		79,619.00	/
Total Fixed Assets			602,574.00
			± 27
Other Assets			
Life Insurance -CSV			8,200.00
Total Other Assets			614,918.00
Liabilities & Net Worth			
Sundry Personal Expenses		3,540.00	
Mortgages Payable		38,150.00	
Total Liabilities			41,690.00
Net Worth	•		573,223.00
matal riskilities a state of			

Total Liabilities & Net Worth

614,913.00

O'BYRNE, ALDRICH & HUB CERTIFIED PUBLIC ACCOUNTANTS 30 WEST STREET DANBURY, CONN. 08910

RICHARD S. ALDRICH, C.P.A. NORMAN E. HUR, C.P.A. JOHN P. O'HYRNE, C.P.A.

(203) 743-0777 (203) 743-4022 (203) 424-2526

May 2, 1970

Mr. & Mrs. Edward Jowdy Cedarcrest Drive Danbury, Connecticut 06810

Dear Mr. & Mrs. Jowdy:

In accordance with your request we have prepared the attached Statement of Financial Condition as of March 31, 1970.

In our opinion the accompaning Statement of Financial Condition presents fairly your financial position as of March 31, 1970.

Respectfully submitted

O'BYRNE, ALDRICH & HUB

EXHIBIT D

Edward & Joan Jowdy Statement of Financial Condition March 31, 1970

Current Assets

Cash

9,312.00

Fixed Assets

Residence at appraised fair	
market value	64,000.00
Building Lot City 1.5 acres	18,000.00
Undivided 33 1/3% interest in	0.
residential land development	
at appraised fair market value	60,000.00
Undivided 22% interest in commercial	
shopping centers at appraised fair	
market value	. 100,000.00
Undivided 33 1/3% interest in	
Warehouse Real Estate and Business	
at appraised fair market value	159,755.00
Undivided 25% interest in	
· . Warehouse Business Book Value	25,200.00
Undivided 50% interest in	
Wholesale Tobacco Business	79,619.00
Total Fixed Assets	. 506,574.00
Other Assets	
Life Insurance CSV	6,400.00
Total Assets	522,286.03
Liabilities & Net Worth	
Sundry Personal Expenses	2,985.00
Mortgage Payable	17,720.00
Total Liabilities	20,705.00
Net Worth .	501,531.00
Total Liabilities & Net Worth	522,256.00

Adm-16

State of Connecticut TAX DEPARTMENT

CREDIT
(Type of Bond)

KNOW ALL MEN BY THESE PRESENTS
That We, GELB BROS. & ZUCKERMAN, INC.
of 14 Beckley Avenue, Stamford, Connecticut
County of Fairfield and State of Connecticut
as Principal, andNSURANCE COMPANY OF NORTH AMERICA
of1600 Arch Street, Philadelphia
County of, duly authorized to do business in the State of Connecticut, as Surety, are held and firmly bound unto the Tax Commissioner of the State of Connecticut and his successors in office in the sum of _ONE HUNDRED THOUSAND Dollars (\$100,000.00) for the payment of which well and truly to be made
the said Principal and Surety do jointly and severally bind themselves, their heirs, executors, administrators, successors and assigns, and each and every of them firmly by these presents. THE CONDITIONS OF THIS OBLIGATION ARE SUCH, THAT
WHEREAS, The Principal has made application to the Tax Commissioner of the State of Connecticut for a license, permit or permission to engage in the business of a Cigarette Distributor under the provisions of Chapter 214 of the General Statutes for the period
commencing October 1 19 69 and ending September 30 19 70

NOW, THEREFORE, If the said Tax Commissioner shall grant the application above referred to and the Principal shall pay all taxes, interest and penalties in accordance with the provisions of the General Statutes pertaining to such business, then this obligation shall be null and void; otherwise to remain in full force and effect.

This bond is for a period commer	ncing lst	_ day of July 1970
and ending 30th day of June		
IN WITNESS WHEREOF, The	said Principal and Surety have signed	and sealed this instrument
this 26th day of June	19 _70	
WITNESS AS TO PRINCIPAL	TITLE Edward J. Lowdy	LS. CORPORATE SEAL
	BY: ITTLE	.s.
WITNESS AS TO SURETY COUNTERSIGNED BY:	BY: Dorothy A. Blythe	.S. CORPORATE SEAL

IN THE UNITED STATES DISTRICT COURT FILED FOR THE DISTRICT OF CONNECTICUT

FEB 19 5 10 PH '74

INSURANCE COMPANY OF NORTH AMERICA,)

Plaintiff.)

vs.

CIVIL ACTION . FILE NO. H 124

GELB BROS. & ZUCKERMAN, INC., JAMES J. JOWDY, JACQUELINE JOWDY, EDWARD J. JOWDY, and JOAN JOWDY, Defendants.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Plaintiff brought this action against defendants to recover the losses and expenses it has incurred and sustained by reason of having become surety on two separate tax payment bonds for defendant Gelb Bros. & Zuckerman, Inc., a corporation wholly owned, controlled, and operated by the defendants, who, in addition to Gelb, executed and delivered to plaintiff their indemnity agreements to induce it to become surety on Gelb's bonds.

Course Of Proceedings.

Plaintiff filed its complaint in four counts. Counts I and II are against Geib, as principal in the bonds, and as indemnitor in two of the indemnity agreements. Count III is against defendants James J. Jowdy and Jacqueline Jowdy on their indemnity agreement with plaintiff. Count IV is against defendants Edward J. Jowdy and Joan Jowdy on their specific indemnity agreement with plaintiff.

The defendants filed no answer or other pleading to the complaint as required by Fed. Rules Civ. Proc., rules 8 (b), (c), and 12 (b), (h), 28 U.S.C.A., but only entered an appearance by their attorneys.

Plaintiff filed a motion for summary judgment, pursuant to Fed. Rules Civ. Proc., rule 56, 28 U.S.C.A., and Local Rule 10 (a) 3,

- 14 -

Under such circumstances the corporate entity will be disregarded, and they will be held liable as individual principals. Zaist v. Martin on the ground that the complaint on file, the documentary exhibits annexed thereto, together with plaintiff's supporting affidavits, and documentary exhibits annexed thereto, show that there is no genuine issue as to any material fact, and that plaintiff is entitled to a judgment as a matter of law.

Plaintiff filed with its notice of motion a statement of material facts and a memorandum brief, in support of the motion, as required by Local Rule 10 (a) 3, and defendants filed a short memorandum brief, in which they challenged plaintiff's right to recover its loss and expenses incurred and sustained on account of one bond.

The motion came on for hearing on December 3, 1973, when, by agreement of counsel, it was submitted to the Court upon the complaint and other documents on file, without oral argument; and it came on for further hearing on February 4, 1974, upon the complaint, the original and supplemental affidavits in support of the motion, the documentary exhibits attached thereto, and the supporting and opposing arguments of counsel.

The court having heard the parties, and having considered the complaint, the motion, the original and supplemental affidavits, all documentary exhibits on file, and the supporting and opposing briefs of the parties, finds the facts, and states its conclusions of law, pursuant to Fed. Rules Civ. Proc., rule 52 (a), as follows:

I. Findings Of Facts.

Background.

1. This action arises out of events and occurrences which originated in April, 1969, when James J. Jowdy and Edward J. Jowdy formed a partnership, and purchased the stock, fixtures, trade name,

and good will of Irving Fisher, a licensed wholesale cigarette distributor, who conducted business at 14 Beckley Avenue, Stamford, Connecticut, under the trade name of Gelb Bros. & Zuckerman.

- 2. Connecticut General Statutes, ch. 14, §§ 12-285 12-330 provides for licensing of cigarette distributors and a tax on cigarettes sold in Connecticut. C.G.S.A., § 12-286 requires each cigarette distributor to secure a license from the tax commissioner before engaging in business, and, under § 12-288, each license shall be valid from the date issued to the following September 30, unless sooner revoked, or the licensee discontinues business; in which event the licensee must return the license to the tax commissioner.
- 3. Pursuant to the requirements of C.G.S.A., §§ 12-286 and 12-288, James J. Jowdy and Edward J. Jowdy, copartners, doing business as Gelb Bros. & Zuckerman, applied to, and obtained from the tax commissioner, a license to engage in business as a cigarette distributor at 14 Beckley Avenue, Stamford, Connecticut; which license expired on September 30, 1969; and they applied for, and obtained, another license for the period beginning October 1, 1969, and ending September 30, 1970.
- 4. Under C.G.S.A., § 12-298, the tax commissioner may, in his discretion, permit a licensed cigarette distributor to purchase cigarette tax stamps on credit, upon filing a tax credit bond satisfactory to the tax commissioner, in an amount not less than the sale price of the stamps so purchased; and the tax commissioner requires the tax credit bond so filed to continue for a one year period, commencing on July 1, and ending the following June 30, which period coincides with the State's fiscal year.

5. Pursuant to C.G.S.A., § 12-298, James J. Jowdy and Edward J. Jowdy, copartners, doing business as Gelb Bros. & Zuckerman, applied to the tax commissioner for a permit to purchase cigarette stamps on credit during the one year period, commencing July 1, 1969, and ending June 30, 1970.

Jowdys' 1969 Tax Credit Bond And Their Indemnity.

- 6. James J. Jowdy and Edward Jowdy, copartners, doing business as Gelb Bros. & Zuckerman, applied to plaintiff for the tax credit bond which they were required to file with the tax commissioner, in the penal sum of \$100,000, for the period commencing July 1, 1969, and ending June 30, 1970.
- 7. In consideration of plaintiff agreeing to become surety on their tax credit bond, and as a condition precedent to plaintiff becoming surety on the bond, James J. Jowdy and Edward Jowdy, with their respective wives, orally promised to execute and deliver to plaintiff written indemnity agreements, wherein they would agree to indemnify plaintiff against all loss, cost, and expense it should sustain or incur by reason of becoming surety on the bond.
- 8. In keeping with their oral promise, James J. Jowdy and Jacqueline Jowdy did execute and deliver to plaintiff their joint and several indemnity agreement, under seal, and dated July 1, 1969.

 A duplicated copy of that agreement is annexed to the supplemental supporting affidavit, as Exhibit A.
- 9. In keeping with their oral promise, Edward J. Jowdy and Joan Jowdy did execute and deliver to plaintiff their joint and several indemnity agreement, under seal, and dated July 1, 1969. A duplicated copy of that agreement is annexed to the supplemental supporting affidavit, as Exhibit B.

- 5 -10. No claim was made by the tax commissioner on the 1969 tax credit bond given by James J. Jowdy and Edward J. Jowdy, copartners, doing business as Gelb Bros. & Zuckerman. 11. As an inducement to plaintiff to become surety on their tax credit bond for the period commencing July 1, 1970, and ending June 30, 1971, James J. Jowdy and Jacqueline Jowdy submitted to plaintiff a statement of their financial condition as of March 31, 1970, prepared by O'Byrne, Aldrich & Hubb, certified public accountants of Danbury, Connecticut, and Edward J. Jowdy and Joan Jowdy also submitted to plaintiff a statement of their financial condition as of March 31, 1970, prepared by the same certified public accountants. Those statements are annexed to the supplemental supporting affidavit, as Exhibits C and D, respectively. 12. During the negotiations for the 1970 tax credit bond, which continued during May and June, 1970, James J. Jowdy and Edward J. Jowdy, with their respective wives, orally promised and agreed to indemnify plaintiff under written indemnity agreements, the same as they had done in the case of the 1969 credit bond, if plaintiff would become surety on the new tax credit bond. The Jowdys Incorporate Gelb Bros. & Zuckerman, Inc. 13. On June 22, 1970, James J. Jowdy and Edward J. Jowdy incorporated Gelb Bros. & Zuckerman, Inc. under the laws of the State of Connecticut, to engage in the business of a wholesale cigarette distributor, with an authorized capital of \$150,000, consisting of 150 shares of \$1,000 par value stock, and a paid in capital of \$1,000; James J. Jowdy was president, Taffy Jowdy, another brother, was vice president, and Edward J. Jowdy was secretary and treasurer; and the board of directors consisted of the three officers. - 18 -

- 14. James J. Jowdy and Edward Jowdy, copartners, doing business as Gelb Bros. & Zuckerman, continued the business as a partnership until June 30, 1970, and, as required by C. G. S. A., § 12-288, they returned the license issued to them on October 1, 1969, and their corporation assumed the business of the partnership as of July 1, 1970.
- 15. Gelb, acting through James J. Jowdy and Edward J. Jowdy, applied to the tax commissioner for a license to engage in the business of a cigarette distributor, pursuant to the requirements of C. G. S. A., §§ 12-286 and 12-288 for the remainder of the period commencing October 1, 1969, and ending September 30, 1970, and for a permit to purchase cigarette stamps on credit for a period of one year, commencing July 1, 1970, and ending June 30, 1971, pursuant to C. G. S. A., § 12-298.

Gelb Bros. & Zuckerman, Inc.'s Tax Credit Bonds.

- 16. At the special instance and request of all defendants, plaintiff became surety on the tax credit bond which Gelb Bros. & Zuckerman, Inc. (hereafter referred to as Gelb) was required to give the tax commissioner pursuant to C.G.S.A., § 12-298, in the penal sum of \$100,000; which was dated June 26, 1970, but became effective July 1, 1970, to cover the one year period from July 1, 1970, to June 30, 1971; and it was conditioned that Gelb should pay all taxes, interest, and penalties in accordance with the provisions of the statute. A duplicated copy of the bond is annexed to the supplemental supporting affidavit, as Exhibit E.
- 17. Gelb also applied to the New York State Tax Commission for a permit to purchase cigarette stamps on credit, and to pay for them within 30 days after purchase, pursuant to Article 20 of the Tax Law.

18. At the special instance and request of all defendants, plaintiff became surety on Gelb's cigarette credit bond required by the New York State Tax Commission, in the penal sum of \$15,000; which was dated September 24, 1970, and was conditioned that Gelb should pay all sums due for cigarette stamps purchased by it, including penalties and interest, within 30 days after the purchase thereof.

Defendants' Agreements To Indemnify Plaintiff.

- 19. In consideration of plaintiff agreeing to become surety on Gelb's tax credit bond required by the tax commissioner of the State of Connecticut, Gelb executed and delivered to plaintiff a written application for that specific bond which contained an indemnity agreement, dated July 1, 1970. That agreement is annexed to the complaint as Exhibit A. Count I of the complaint is based on it and the bond.
- 20. In consideration of plaintiff agreeing to become surety on Gelb's cigarette credit bond required by the New York State Tax Commission, Gelb executed and delivered to plaintiff a written application for that specific bond which contained an indemnity agreement, dated September 24, 1970. That agreement is annexed to the complaint as Exhibit B. Count II of the complaint is based upon it and the bond.
- 21. In both indemnity agreements, Gelb agreed to indemnify plaintiff from and against any and all loss, costs, charges, damages, counsel fees and expenses of whatever kind or nature plaintiff might sustain or incur by reason of having become surety on the two bonds, and Gelb further agreed that any voucher or other evidence of loss, costs and expenses paid by plaintiff in good faith as a result of the two bonds should be prima facie evidence of the fact and extent of its liability to plaintiff.

- 8 -22. In consideration of plaintiff agreeing to become surety on the tax credit bond which Gelb was required to file with the tax commissioner of the State of Connecticut for the one year period commencing July 1, 1970, and ending June 30, 1971, and as a condition precedent to plaintiff agreeing to become surety on that bond, James J. Jowdy and Edward J. Jowdy, with their respective wives, orally promised and agreed to execute and deliver to plaintiff written indemnity agreements, wherein they would agree to indemnify plaintiff against all loss, cost, and expense it should sustain or incur by reason of becoming surety on that bond, the same as they had done in the case of the 1969 credit bond which plaintiff had executed for the partnership. 23. In reliance upon the oral promises and agreements of James J. Jowdy, Jacqueline Jowdy, Edward J. Jowdy, and Joan Jowdy to execute and deliver to plaintiff written indemnity agreements, naming Gelb, their corporation, as Principal, the tax credit bond, naming Gelb, as Principal, and plaintiff, as Surety, in the penal sum of \$100,000, dated June 26, 1970, was signed and sealed by the Principal and Surety in plaintiff's Hartford Service Office on June 26, 1970. 24. In compliance with their oral promises and agreements, James J. Jowdy and Jacqueline Jowdy did execute and deliver to plaintiff their joint and several indemnity agreement, under seal, which was dated July 1, 1970. That agreement is annexed to the complaint as Exhibit C, and to the supporting affidavit as Exhibit A. Count III of the complaint is based upon that indemnity agreement. 25. In compliance with their oral promise and agreement, Edward J. Jowdy and Joan Jowdy did execute and deliver to plaintiff their joint and several indemnity agreement, under seal, and dated July 1, 1970. That agreement is annexed to the complaint as Exhibit D, 20 -

and to the supporting affidavit as Exhibit B. Count IV of the complaint is based upon that indemnity agreement.

- 26. The New York tax credit bond was executed and delivered by plaintiff in reliance upon the written indemnity agreements executed by James J. Jowdy, Jacqueline Jowdy, Edward J. Jowdy, and Joan Jowdy.
- agreements, dated July 1, 1970, contain identical language. The first whereas clause refers to Gelb, the corporation, as Principal, and it recites that plaintiff may from time to time "hereafter execute bonds" in behalf of the Principal. The second whereas clause recites that the "Indemnitor is financially *** interested in the affairs of the Principal and is, therefore, interested in enabling the Principal to procure the prompt and ready execution of such bonds." The third whereas clause recites that "to accomplish such purpose the Indemnitor is willing to execute this continuing agreement of indemnity." The foregoing premises constitute the consideration for the agreement. In paragraph 1, the agreement recites that the term provisions, conditions and agreements contained therein shall be binding upon the Indemnitor "with respect to any such bonds hereafter executed by the Company for the Principal."
- 28. By paragraph 2 of their indemnity agreements, the indemnitors agreed to perform the obligations of the bonds, and to indemnify plaintiff from and against every claim, demand, loss, liability, cost, charge, attorneys' fees, or expenses which plaintiff might sustain or incur by reason of executing the bonds.

28. (a) The Court specifically finds that under the totality of the circumstances surrounding the execution of the Connecticut tax credit bond dated, signed, and sealed on June 26, 1970 at the plaintiff's Hartford office was mutually intended by all parties to become effective July 1, 1970. It was intended by the parties to be secured by the indemnity agreement signed on July 1, 1970, and constitued one continuing contractual agreement. Otherwise, the indemnity agreement would have no meaning and constitute a vain and purposeless act. This is further confirmed by the fact that the application 1/of the defendants for the bond issued June 26, 1970, was itself not signed until July 1, 1970.

^{1/} Exhibit A attached to the complaint

- 29. By paragraph 4 of their indemnity agreements, the indemnitors further agreed that their liability should extend to and include
 all costs, expenses, and attorneys' fees incurred or sustained by plaintiff in making any investigation on account of the bonds, or in defending
 any action brought in connection therewith, or "in enforcing any of the
 agreements contained herein."
- 30. By paragraph 8 of their indemnity agreements, the indemnitors also agreed that in the event of payment, settlement or compromise in good faith of any claim, demand, loss, liability, cost, charge, attorneys' fees or expenses in connection with the bonds, an itemized statement thereof sworn to by an officer of the company, or other evidence of such payment, shall be prima facie evidence of Gelb's liability and of their liability to plaintiff.

Plaintiff Sustains Losses Under Gelb's Bonds.

- 31. Between July 1, 1970, and June 30, 1971, Gelb purchased cigarette tax stamps from the tax commissioner of the State of Connecticut, and it breached the conditions of its bond in that it failed to pay for such stamps as it was required to do by the statutes and its bond. Plaintiff was required to, and did on January 31, 1972, pay the tax commissioner of the State of Connecticut the sum of \$82,803.22 in settlement of the claim on its bond, as evidenced by the official receipt of the tax commissioner attached to plaintiff's supporting affidavit.
- 32. Gelb also breached the conditions of its bond given to
 the New York State Tax Commission, in that it purchased cigarette
 stamps on credit, and failed to pay for such stamps within thirty days
 after the purchase thereof, and plaintiff was required to, and did on

December 27, 1971, pay the New York State Tax Commission the sum of \$8,987.60 in settlement of the claim on its bond, as evidenced by the official receipt of the New York State Tax Commission annexed to plaintiff's supporting affidavit.

Attorney's Fees And Expenses Incurred By Plaintiff.

- 33. Plaintiff has incurred, and obligated itself to pay, its attorney for services rendered from October 20, 1971, to May 2, 1973, in the investigation and settlement of the two claims made against it on its bonds, and in attempting to collect its losses and expenses from defendants, without litigation, in the sum of \$5,250.00, as shown by plaintiff's supporting affidavit.
- 34. Plaintiff has also incurred, and obligated itself to pay, its attorney for his services rendered in bringing this action against defendants to enforce the provisions of their indemnity agreements, in the further sum of \$3,750.00, as shown by the supporting affidavit; which fees are 'specifically provided for in the indemnity agreements.
- 35. Plaintiff has incurred, and has obligated itself to reimburse its attorney for his out of pocket expenses paid in connection with the investigation and settlement of the claims against the two tax payment bonds which, exclusive of costs incurred and paid in connection with this specific action, in the aggregate amount of \$36.48, as shown by an itemized statement attached to plaintiff's supporting affidavit.
- 36. The Court finds from the documentary evidence before it that plaintiff's claims for attorney's fees and the out of pocket expenses of its attorney have been incurred by plaintiff in good faith, and that such claims are reasonable.

37. Upon the undisputed evidence, the Court finds that plaintiff's claim against defendants consists of the following:

Dec. 27, 1971, N.Y. State Tax Commission, lo	ss \$ ·	8,987.60
Dec. 27, 1971 - May 24, 1972, Int. @ 8%	296.00	
May 24, 1972 -Feb. 14, 1974, Int. @ 6%	946.60	1,242.60
Jan. 31, 1972, Conn. Tax Commr., loss		82,803.22
Jan. 31, 1972 - May 24, 1972, Int. @ 8% 2,	79.20	
May 24, 1972 - Feb. 14, 1974, Int. @ 6% 8,	707.80	10,787.00
Losses and accrued interest	1	03,820.42
Oct. 20, 1971 - May 02, 1972, Attorney's fees in	ncurred	5, 250.00
July 01, 1973, to date of judgment		3,750.00
Oct. 20, 1971 to date - Expenses paid by plainti	ff's	
attorney for plaintiff's account		36.48
Loss, interest on loss, attorney's fees, and exp	enses \$1	12,856.90

II. Conclusions of Law.

In this diversity action, Connecticut law governs the construction of the indemnity agreements involved, and the substantive law of Connecticut is to be applied in determining the rights and liability of the parties to those agreements. Eric Railroad Co. v. Tompkins, 304 U.S.

64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938); Ruhlin v. New York Life

Insurance Co., 304 U.S. 202, 58 S. Ct. 860, 82 L. Ed. 1290 (1938).

It does not require the citation of authority to sustain the proposition that plaintiff has succeeded, under the doctrine of subrogation, to all rights and remedies of the States of Connecticut and New York against the principal and any other parties who may be liable for the payment of Gelb's debts to those states.

In the absence of a contract of indemnity, the law implies such a contract, and the surety may recover from its principal all loss, costs, and expenses it incurs in complying with its contract of surety-ship. Bunce v. Bunce, Kirby (Conn.), 137 (1786); Ward v. Henry, 5 Conn. 595 (1825); Howell v. Commissioner, 69 F. 2d 447, 450 (8th Cir. 1934), cert. den. sub nom, Howell v. Helvering, 292 U.S. 654, 54 S. Ct. 864, 78 L. Ed. 503 Phelps v. Dawson, 97 F. 2d 339

*8th Cir. 1938); Fidelity and Deposit Co. v. Hobbs, 144 F. 2d 5, 8 (10th Cir. 1944).

In Ward v. Henry, supra, the Supreme Court of Connecticut settled the Connecticut law on this point, when it said:

"This I believe to be a contract to indemnify the surety from any injury which he may suffer, by incurring such liability. This contract is supposed to arise at the moment when the surety contracts his obligation; and is broken the moment when the surety is damnified, whether that damage consists in being obliged to pay the debt, or suffering any other legal injury."

Here, James J. Jowdy and Edward J. Jowdy, copartners, doing business as Gelb Bros. & Zuckerman, obtained a license from the tax commissioner to engage in business as a cigarette distributor, and a permit to purchase cigarette stamps on credit, upon filing with the tax commissioner the required bond for the period commencing July 1, 1969, and ending June 30, 1970, wherein they were named as principals, and plaintiff was memed as surety.

On June 22, 1970, or eight days before a new tax credit bond had to be filed with the tax commissioner, James J. Jowdy and Edward J. Jowdy caused Gelb Bros. & Zuckerman, the trade name under which they were then operating, to be incorporated; with 150 shares of stock being issued to them or to members of their families, and a paid in capital of \$1,000.00. They, with another brother, were the officers and directors of the corporation.

It is clear from the facts of this case that James J. Jowdy and Edward J. Jowdy and their corporation are one and the same for all practical purposes, for they so dominated its finances, policies, and practices that their corporation had no separate mind, will or existence of its own, and it was the mere instrumentality of the two individuals.

Under such circumstances the corporate entity will be disregarded,
and they will be held liable as individual principals. Zaist v. Martin

Olson, 154 Conn. 563, 227 A. 2d 552 (1967); Segan Construction Corp.

v. Nor-West Builders, Inc., 274 F. Supp. 691 (D. C. Conn. 1967);

Wyoming Construction Corp. v. Western Casualty & Surety Co.,

275 F. 2d 97 (10th Cir.).

In this case, the defendants have executed and delivered to plaintiff their written indemnity agreements, under seal, pursuant to their earlier promises and agreements to fully indemnify plaintiff, and to execute such indemnity agreements, if plaintiff would become surety on the tax credit bonds for their corporation. Plaintiff did become surety on the bonds at defendants' request, and it has sustained losses and incurred expenses by so doing.

In their indemnity agreements, the Jowdys have stated that they are financially and otherwise interested in the affairs of the "Principal" named in the bonds, and they agreed to perform the obligations of the bonds, and to indemnify plaintiff against every claim, demand, loss, liability, charge, attorney's fees or other expenses it incurred or sustained by reason of becoming surety on the bonds, including all costs, expenses, and attorney's fees incurred or sustained in this action to enforce the indemnity agreements against them.

The cardinal rule in construing a contract of indemnity is to ascertain the intention of the parties to the contract, and to give effect to that intention. 41 Am. Jur. 2d, Indemnity, § 13.

When the indemnity agreement is clear, as these indemnity agreements are, it is to be upheld according to its terms, absent a showing of fraud, and none is shown or suggested here. Fidelity and

Deposit Co. v. Cataldo, 265 Mass. 458, 164 N.E. 379 (1929).

When the indemnity agreement provides that the indemnitor will be liable to the surety for court costs and attorney's fees in the event the surety is required to enforce the terms of the indemnity agreement, as the indemnity agreements in this case provide, the indemnitors will be liable to the surety for such court costs and attorney's fees. Miller v. Housing Authority of New Orleans, 175 So. 2d 326, 336 (La. App. 1965), and cases cited therein.

A contract of indemnity is an original undertaking to save the indemnitee harmless against loss or damage of a specified character which may happen in the future. Wolthausen v. Trimpert, 93 Conn. 260, 105 A. 687 (1919); New Amsterdam Casualty Co. v. Waller, 233 N.C. 536, 64 S.E. 2d 826 (1951).

The Jowdys concede that, under the terms of their indemnity agreements, they are bound to indemnify plaintiff against all loss, cost, and expense plaintiff has sustained or incurred in meeting its obligations under the bonds; and they concede their liability to plaintiff for costs, expenses, and attorney's fees in enforcing the indemnity agreements against them.

However, they contend in their opposing brief that the Jowdys should not be liable under their indemnity agreements for the loss, cost, and expense plaintiff has sustained and incurred in complying with its obligation under the bond which they filed with the tax commissioner of the State of Connecticut, because the first whereas clause recites that plaintiff may "hereafter execute bonds" in behalf of the principal, and paragraph 1 recites that the indemnity agreements shall be binding upon them "with respect to any such bonds hereafter executed *** for the principal."

The thrust of the Jowdys' argument is that the bond was dated June 26, 1970, and their indemnity agreements are dated July 1, 1970, and therefore the bond filed with the tax commissioner of the State of Connecticut was executed by plaintiff before the indemnity agreements were executed, and there was no consideration for them. Defendants' argument is completely without merit both in fact and in law.

Under Connecticut law, the indemnity agreements are sealed instruments, C.G.S. § 52-179. The indemnity agreements, being under seal, import a consideration. Salowitz v. Squillacot, 10 Conn. Supp. 220, and cases cited therein, (1941).

In Count I, paragraph 2, of the complaint, plaintiff alleges
that Gelb applied to the tax commissioner for a license and a permit
to purchase cigarette stamps on credit for the period commencing
July 1, 1970, and ending June 30, 1971, pursuant to the statute. In
paragraph 5, it is alleged that, between July 1, 1970, and June 30, 1971,
Gelb purchased cigarette tax stamps from the tax commissioner, and
failed to pay for them, in consequence of which a claim was made on
the tax credit bond.

Plaintiff repeated those allegations in Counts III and IV of the complaint, by reference. In paragraph 2 of those counts, plaintiff alleges that, in consideration of it agreeing to become surety on Gelb's bond, and as a condition precedent to plaintiff agreeing to become surety on that bond, the Jowdys executed and delivered to it their indemnity agreements, dated July 1, 1970.

Defendants failed to file a responsive pleading to plaintiff's complaint, as required by the Federal Rules of Civil Procedure, or deny the allegations therein, and therefore they have admitted the truth of all allegations in the complaint. Fed. Rules Civ. Proc.

rule 8 (b), (d); McComb v. Blue Star Auto Stores, 164 F. 2d 329 (7th Cir. 1947); Consolidated Packaging Machinery Corp. v. Kelly, 253 F. 2d 49 (7th Cir. 1958), cert. den., 357 U.S. 906, 78 S. Ct. 1151, 2 L. Ed. 1156; National Union Fire Ins. Co. of Pittsburgh, Pa. v. Fannin, 257 F. Supp. 1017 (D.C. Ohio 1966); United States ex rel. Automatic Sprinkler Corp. v. Merritt-Chapman & Scott Corp., 305 F. 2d 121 (3rd Cir. 1962).

Fed. Rules Civ. Proc. rule 8 (b) provides that: "A party shall state in short and plain terms his defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies."

Rule 8 (d) provides: "Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in a responsive pleading."

The terms "execute" and "executed" as used in the indemnity
agreements clearly mean complete performance of all that is required
to make the bond a valid and legally binding obligation of the surety,
namely, signing, sealing, and delivery to the obligee, in this case the
tax commissioner. It is clear law that the bond did not become a valid
and binding obligation until there was a delivery to the tax commissioner.

Although the bond is dated June 26, 1970, it clearly states:
"This bond is for a period commencing the 1st day of July, 1970, and ending the 30th day of June, 1971." The Jowdys' corporation did not obtain a license and a permit from the tax commissioner until July 1, 1970. The bond was filed to secure the permit. The Jowdys operated under the 1969 credit bond through June 30, 1970.

The Jowdys produced no evidence, and plaintiff has produced no evidence, as to the exact date or hour when the bond was actually filed

with the tax commissioner. No such proof is necessary. The allegations in the complaint that the Jowdys requested plaintiff to write the bond, and that the Jowdys executed and delivered their indemnity agreements to plaintiff as a condition precedent to plaintiff becoming surety on the bond, having been admitted, plaintiff has a right to rely on the admissions.

Fontes v. Porter, 156 F. 2d 956, 957 (9th Cir. 1946); Freedom Nat.

Bank v. Northern Illinois Corp., 262 F. 2d 601, 605-6-6 (7th Cir. 1953);

United States v. Merritt-Chapman & Scott Corp., 305 F. 2d 121 (3rd Cir. 1962).

It is clear that the oral promises and agreements of the Jowdys to indem ify plaintiff against loss or damage under the bond, their application to the tax commissioner in the name of their wholly owned corporation for a license as a cigarette distributor and a permit to purchase cigarette stamps on credit, beginning July 1, 1970, the execution and delivery of the written indemnity agreements to plaintiff, and the filing of the bond to secure the license and permit were so interrelated as to constitute one transaction, and it is obvious from the sequence of events which occurred immediately before the undertakings enumerated above that the Jowdys intended the written indemnity agreements to cover the bond of their corporation which was filed with the tax commissioner at their behest. Commercial Casualty Ins. Co. v. Murphy, 282 Mass. 100, 184 N.E. 434, 436 (1933); Federal Nat. Bank v. Commonwealth, 282 Mass. 442, 185 N.E. 9, 12 (1933).

Lack of consideration or an avoidance must be set forth in a responsive pleading as an affirmative defense. Defendants have filed no responsive pleading to the complaint, and they have valved the defense of lack of consideration for the indemnity agreements, or any other defense

seeking to avoid liability under those agreements. Fed. Rule Civ. Proc., rule 8 (c), rule 12 (h), 28 U.S.C.A.; Bernard v. United States Aircoach, 117 Fed. Supp. 134 (D.C. Cal. 1953); Lopez v. United States Fidelity & Guaranty Co., 18 F.R.D. 59 (D.C. Alaska 1955); Pacific Indemnity Co. v. Wyrembek, 183 F. Supp. 252 (D.C. Wis. 1960); Seaboard Surety Co. v. Harbison, 304 F. 2d 247 (7th Cir. 1962); Wagner v. Fawcett Publications, 307 F. 2d 409 (7th Cir. 1962), cert. den. 372 U.S. 909, 83 S. Ct. 723, 9 L. Ed. 718; Strauss v. Douglas Aircraft Co., 404 F. 2d 1152 (2d Cir. 1968).

Fed. Rules Civ. Proc., rule 8 (c) provides that a party shall set forth affirmatively failure of consideration, and any other matter constituting an avoidance or affirmative defense.

Fed. Rules Civ. Proc., rule 12 (h) provides that a party walves all defenses and objections which he does not present either by motion or in his answer or reply.

Here, defendants have filed no responsive pleading, and they have not set forth any affirmative defense. Under the rules and under all of the decisions, they have waived any defense they may have to this action

bonds should be prima facie evidence of the fact and extent of its liability to plaintiff.

Wagner v. Fawcett Publications, supra, was an action for invasion of privacy. The statute of limitations was involved as a defense, but defendant did not assert it as an affirmative defense. Defendant filed no answer in that case, but only a motion to dismiss the case.

Speaking directly to this point, the court said:

"This record reveals, therefore, that Fawcett did not raise in any manner authorized by law the defense of the statute of limitations to plaintiff's right of privacy action. Instead, by its motion to dismiss, it attacked the complaint on the merits, thus waiving the affirmative defense of the statute of limitations to the right of privacy action."

The court went on to hold that the raising of the defense of the statute of limitations is a personal privilege of the defendant, but if

defendant fails to take advantage of that privilege in a manner provided by law, it is waived.

In Strauss v. Douglas Aircraft Co., supra, the court again had before it a proposed amendment to an answer belatedly filed by the defendant to assert the statute of limitations. Judge Kaufman followed the Fawcett case, and held that the statute of limitations is an affirmative defense or a so called personal privilege defense which may be waived if not promptly pleaded.

A memorandum of law is not a pleading. Therefore, the suggestion or argument in defendants' memorandum of law which seeks to assert a defense is clearly not recognized by any rules of procedure or the cases.

Here, James J. Jowdy and Edward J. Jowdy caused Gelb Bros. & Zuckerman to be incorporated on June 22, 1970, and all shares of stock were issued to them or to members of their families. There was paid in capital of only \$1,000, an amount wholly insufficient to operate a business of the magnitude they were operating, and it could by no means qualify for a \$100,000 bond, without their personal indemnity. They owned, controlled, and operated the corporation. They caused their instrumentality to default in the payment of the debt owed to the tax commissioner for the cigarette stamps purchased by them, and for which they got the benefit. Under Connecticut law and the circumstances of this case, the Jowdys are liable as individuals for all of plaintiff's loss, cost, and expense, even without the written indemnity agreement. The agreement simply spells out the extent of their liability. Fairness and justice require that the Jowdys be held liable for all of plaintiff's loss and expense for which this action is brought.

Here, there is no issue of fact. In light of the admitted facts and the law applicable to those facts, plaintiff is entitled to judgment against all defendants as a matter of law. Accordingly, judgment will enter in favor of plaintiff, and against defendants for \$112,856.90.

Dated at Hartford, Connecticut, this fourteenth day of February, 1974.

UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

RT FILED

DISTRICT OF CONNECTICUT

U.S. DISTRICT COURT HARTFORD, CONN.

INSURANCE COMPANY OF NORTH AMERICA :::

vs.

::: CIVIL ACTION NO. H-124

JUDGMENT

The above-entitled action came on for hearing before the Court, Honorable T. Emmet Clarie, United States District Judge, presiding, on Plaintiff's Motion for Summary Judgment;

:::

And the Court having filed its Findings of Fact and Conclusions of Law on February 19, 1974, granting said Motion for Summary Judgment;

It is accordingly ORDERED and ADJUDGED that Plaintiff,
Insurance Company of North America, recover of all Defendants,
Gelb Bros. & Zuckerman, Inc., James J. Jowdy, Jacqueline
Jowdy, Edward J. Jowdy, and Joan Jowdy, the sum of \$112,856.90,
and its costs of this action.

Dated at Hartford, Connecticut, this 4th day of March, 1974.

SYLVESTER A. MARKOWSKI Clerk, United States District Court

By:___

Deputy-in-Charge

after the purchase thereof, and plaintiff was required to, and did on

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

INSURANCE COMPANY OF NORTH AMERICA,)

Plaintiff,)

vs.

CIVIL ACTION
FILE NO. H 124

GELB BROS. & ZUCKERMAN, INC.,

JAMES J. JOWDY, JACQUELINE JOWDY,

EDWARD J. JOWDY, and JOAN JOWDY,

Defendants.)

BILL OF COSTS.

Judgment having been entered in this action in favor of plaintiff
Insurance Company of North America, and against defendants Gelb Bros.
& Zuckerman, Inc., James J. Jowdy, Jacqueline Jowdy, Edward J. Jowdy,
and Joan Jowdy, the clerk is requested to tax the following as costs:

July 27, 1973 filing fee paid to the clerk	\$ 15.00
Sep. 25. 1973 U.S. Marshal's fees for serving	
summons and copy of complaint on each of the five defendants	. 69.00
Docket fee under 28 U.S.C.A., § 1923	20.00
Total	\$104.00

STATE OF CONNECTICUT) ss

I, Elmer W. Beasley, do hereby swear that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy hereof was this day mailed to Mark A: Asmar, Esq. One Constitution Plaza, Hartford, Connecticut 06103, by United States Mail, postage prepaid.

Please take notice that we will appear before the clerk who will tax said costs on Friday, March 8, 1974, at ten o'clock A.M.

Elmer W. Beasley

9.00 Asylum Avenue
Hartford, Connecticut 06105
Telephone 525-2752

Attorney for Plaintiff

Subscribed and sworn to before me this sixth day of March, 1974 at Hartford, Connecticut.

Notary Public

Costs are hereby taxed in the amount of \$104.00 this eighth day of March, 1974.

SYLVESTER A. MARKOWSKI

Clerk

Deputy Clerk

MAR 15 5 50 PH '74

(8th Cir. 1934), cert. den. sub nom, Howell v. Helvering, 292 U.S. 654, 54 S. Ct. 864, 78 L. Ed. 503 Phelps v. Dawson, 97 F. 2d 339

(Transcript page 2) THE COURT: The reason I thought it best to put this down on the calendar is because, in receiving the file on the question of summary judgment, in respect to the proposed findings of fact and conclusions of law, it came to the attention of the Court, the specific issue, as to whether or not the indemnity agreement, which contained a provision to the effect that the covered bonds, hereinafter issued, whether it included the specific bond or bonds which are the subject of this litigation.

And apparently that was brought out in adversary counsel's brief or memorandum.

I would like to hear a little further about that.

It reaised some questions in my mind. Mr. Beasley, what is your position on that particular issue? What do you say concerning that alleged finding, that relates to the subject matter.

* * *

THE COURT: Was this the first bond relationship between the parties?

MR. BEASLEY: No, it was not.

THE COURT: Or was this a continuing relationship?

(Transcript page 3) MR. BEASLEY: It was a continuing elationship, your Honor. And in order to make this abundantly clear, I have obtained a supplemental affidavit, which sets this out. And I did not have time to get it down here

THE COURT: Well, in a nutshell -- if you have an extra copy for the law clerk, I am sure he would be pleased to review it.

MR. BEASLEY: I do have. ... And I will certainly give Mr. Asmar a copy of it.

KLEINMAN.
O'NEILL.
STEINBERG
& LAPUK
PP PRATT STREET

before.

* * *

of its own, and it was the mere instrumentality of the two individuals.

(Transcript page 8) MR. BEASLEY: ... "And in reliance upon that oral agreement to write the bond, or on their personal indemnity, I.N.A. caused the bond to be executed -- not executed, but signed -- in its office on June 26th."

* * *

(Transcript page 16) MR. ASMAR: "Our position is basically we are sued -- until this morning we were being sued on a basis of an indemnity agreement and bond issued in 1970. We had no knowledge of the supplemental affidavit until now."

* * *

(Transcript page 27) THE COURT: When did the stamp on the Tax Commissioner's official records indicate that it was received at his office?

MR. ASMAR: We don't have a copy of it, your honor.

THE COURT: Wouldn't that be wise, to have that on file, gentlemen?

MR. BEASLEY: Yes, your Honor. The bond annexed to the affidavit is Exhibit E. That came from the Tax Commissioner's office.

* * *

THE COURT: Now, is there a stamp?

MR. BEASLEY: There is no stamp on it.

MR. ASMAR: There is no stamp on it, your Honor.

THE COURT: Don't they usually put it through a

time clock?

MR. BEASLEY: No. Well, I don't know. I just know that there is none on that.

* * *

KLEINMAN.
O'NEILL.
STEINBERG
& LAPUK
99 PRATT STREET
ARTFORD, CONN. 0610

showing of fraud, and none is shown or suggested here. Fidelity and

Burnaryes

PLOYER BOND

25% COTTON FIBER

CERTIFICATION OF SERVICE

Two copies of the foregoing have been sent this day by United States Mail, postage prepaid, to Elmer W. Beasley, Esq., 880 Asylum Avenue, Hartford, Connecticut 06105.

Norris L. O'Neill

Commissioner of Superior Court

KLEINMAN,
O'NEILL,
STEINBERG
& LAPUK
SO PRATT STREET
ARTTFORD, COMM. 00100